

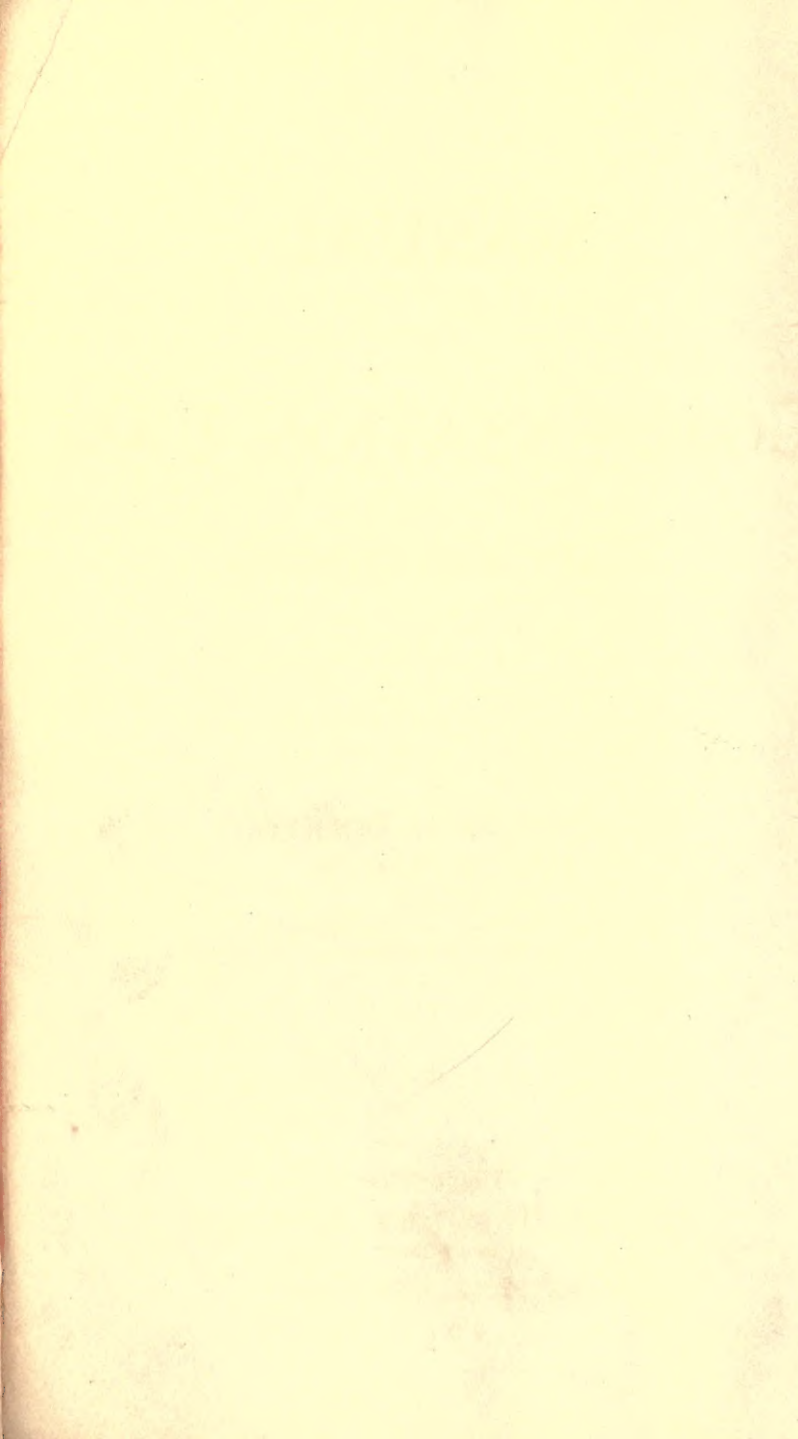


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MANUAL
OF
COMPENSATION LAW
STATE AND FEDERAL

BY
NICHOLAS H. DOSKER
Of the Louisville, Ky., Bar
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Kentucky Workmen's Compensation Law
Annotated and Explained

PUBLISHERS
THE BALDWIN LAW BOOK CO.
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THE BALDWIN LAW BOOK CO.

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1917

PREFACE.

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The Acts of the various States, while similar as to the basic principles involved, vary as to detail and manner of operation. It is self-evident that the text of the Act of any State, and the decisions of the courts, boards or commissions construing it, are first to be consulted. But there are certain provisions, similar in principle if not in exact phraseology, which are common to the majority of Acts now in force. They seem to be the storm-centers out of which the greater portion of litigation under Workmen's Compensation Acts has arisen.

This is not intended to be an encyclopaedic treatment of the general subject of Workmen's Compensation. It is considered that an attempt to reconcile the Acts in detail would be confusing rather than helpful.

Practically all of the decisions of courts of last resort, and some of those of boards or commissions are collected and grouped in such a way as it is expected will prove most useful for easy reference. Whenever in keeping with the plan of this work the facts upon which a decision is based and the exact language of the Court on the point involved are quoted to illustrate the point under consideration.

The Federal Act of 1916 is printed in full and annotated wherever applicable, with the decisions of the Solicitor for the Department of Labor. This book is interleaved with blank pages for the insertion of additional authorities so that it can be kept up to date. It is as the name signifies, a manual of compensation law, and it is offered with the hope that it will facilitate investigation of this new and rapidly widening field of litigation.

Louisville, Ky., June 1, 1917.

N. H. D.



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INTRODUCTION

Von Jhering in *The Struggle for Law* says: "All of the great achievements which the history of the law has to record—the abolition of slavery, of serfdom, the freedom of landed property, of industry, of conscience—have had to be won by the most violent struggles, which often lasted for centuries. Not infrequently streams of blood and everywhere rights trampled under foot mark the way which law has traveled during such conflict. For the law is a Saturn devouring his own children. The law can renew its youth only by breaking with its own past."

Great and sudden changes in the body of law have usually been ushered in by great national or industrial cataclysms. In the brief space of seven years, an enormous branch of the law has been uprooted bodily in two-thirds of the United States and supplanted by an entirely new system of rules and remedies. I refer to the substitution of Workmen's Compensation Acts for the Law of Negligence, as touching the relation of Master and Servant. So tremendous is the impetus this movement has gathered that it is not a far stretch of the imagination to say that the next decade will find the law of Master and Servant a memory. Great as has been this change, the accomplishment of it has been effected without a great struggle.

Negligence, as developed under the common law, was regarded in the nature of a crime. It was a personal matter between the Master and the Servant. The one sought to punish the other by suing for damages. For this reason, until the passage of the Lord Campbell's act, an action for negligence died with the person. There were certain degrees of negligence and for certain flagrant kinds, punitive as well as compensatory damages were allowed. There is still in every action for damages this *quasi* criminal attri-

bute of negligence. The great common law defenses—the doctrines of contributory negligence, fellow servant, and assumed risk, were gradually developed. They, as well as the law of primary negligence, were added to, subtracted from and qualified and modified until the original doctrines were almost lost in the maze of court decisions concerning them. Truly can it be said of these doctrines, ‘What crimes have been committed in thy name.’ The purpose of the foregoing is merely to show that the very theory of the law of Master and Servant is bound to create friction between them. Where there is injustice on the one side, the other is likely to resort to unfair tactics to retaliate, and thus the courts, having the enforcement of this branch of the law, have, of recent years, become but a new arena for the bitter struggle between capital and labor. The abuses, the injustices, the inequalities of the Law of Master and Servant are the direct cause for the passage of Workmen’s Compensation Acts. It is true that these laws are rather the enactment of the principles of social science and economics than a development of law as we have grown used to it. They are indeed an important development of the use of the police powers of the State.

The vast industrial growth in this country has been shadowed by an ever increasing yearly toll of deaths and of maimed and disabled workmen, a strikingly small per cent of whom were under the law compensated in any measure whatever. Employers’ Liability Laws produced only a negligible improvement. Commissions were appointed in various States to investigate conditions, and the mean result of all of their findings is rather startling. This result is well put by Wayne C. Williams, a member of the Industrial Commission of Colorado: “Only about one-half of the suits brought ever result in any recovery, and less than one-third of the suits brought (when death occurs) ever bring a verdict of over \$500.00. Only about thirteen per cent of the injuries that occur in industry are ever com-

pensated through law suits, from fifty to eighty per cent receive nothing whatever."

A great number of things contribute to the causes of injuries. Sometimes the employer is entirely at fault, sometimes the workman, and sometimes both are at fault. But no matter how careful the employer or the employee is, or how many regulations or laws for the prevention of accidents are made, the fact remains that statistics show that nearly fifty-five per cent of the accidents are the result of the natural hazard of the business. It certainly is not fair for the employee to bear the financial loss resulting from the natural hazard of the business in which he is engaged; neither is it fair for the employer to assume this loss entirely. Workmen's Compensation Acts are based upon the theory that the extra cost due to their operation is ultimately borne by society at large. It was well said in an editorial in *The Outlook* of March 1, 1913: "When a machine is injured in the course of its use, the owner of the machine bears the cost of the injury and charges it to the expense of production, for which he receives payment as he sells his goods. When, however, a workman is injured in the course of his employment, the cost of the injury comes upon him, who can ill afford to bear it; and if his injury is serious, resulting in long incapacity for work, or in death, his family is drafted into that great army of dependents that is a reproach to our civilization. There is no reason that common sense can accept why the cost in human efficiency and human life of the production of the things that people need should not be charged to the account of that production, just as is charged the cost of injury to machinery."

That inequalities among those injured existed under the old system is patent to even a casual observer. Some men badly injured without any fault on their part have received nothing and others with practically no injuries have, through fraud or perjury, received many times what they were entitled to. Under the contingent system of fees in

personal injury cases, attorneys have almost universally received far more than their just share of the amount recovered by persons injured. There can be no question of the fact that the old system was bad. This was long ago recognized abroad, but it has only been in the last few years that our public conscience has been aroused on this subject. The successful experiments of Europe with workmen's compensation laws led to an attempt to relieve the situation here by similar laws. The result has been that compensation laws have been passed in thirty-two States and two Territories, comprising over eighty per cent of the total population of the United States, and in twelve other States steps have been taken looking forward to early enactment.

The workmen's compensation idea was first tried out in Germany. In 1884 it was in general operation there. The plan has been enlarged and developed until now they have sickness, accident and disability insurance all of which is paid for by the employers and the employees, who are compelled to contribute to a fund which is managed by officers chosen from the employing and working classes. The whole system is under government supervision.

In England various attempts were made to introduce this system, but it was not until 1897 that a law was passed and became effective. There the plan is different from what it is in Germany and the benefits of the law are administered by the employers direct or through insurance companies who guarantee their risk under the law.

In this country various States have adopted different plans. In almost every instance the law is administered by Industrial Boards. The benefits granted by the acts are very similar, differing chiefly in the per cent of average weekly wages paid to injured workmen; but the methods by which the payment of these benefits is guaranteed, fall into three different groups. First, where there is a monopoly by stock insurance companies; second, where there is a monopoly of State funds—commonly termed State Insur-

ance—where the State finances the operation of the act out of its treasury, and third, where there is competition between State funds, stock companies, mutuals, reciprocals, inter-insurers or some combination of these insurance carriers.

Workmen's compensation acts undoubtedly very materially reduce the number of suits for damages growing out of the relation of master and servant; and, therefore, their operation affects, in a measure, the business of a large body of lawyers. However, affected or unaffected, the bar as a whole should, and I think does stand for any laws which tend to reduce industrial strife and increase the sum total of human prosperity and happiness.

NICHOLAS H. DOSKER.

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Section.

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COMPENSATION LAW.

§ 1. Who Are Employers.

The various acts have many different provisions concerning employments covered. It is practically impossible to make a general statement about this phase of the acts and it is difficult to even group them with any degree of accuracy. The statute of the State must be examined to determine whether acceptance of the act in a particular employment is compulsory or elective or whether the employment is specifically exempted from the operation of the law.

It can be said that generally employers having less than a stipulated number of employees, usually three or five, are not covered.

In a number of States only the hazardous employments are directly subject to the act, but in most of those States the non-subject employer can agree with the employees to accept its provisions.

In the majority of the States having these laws, all employments are subject to the act unless they are especially exempted. Generally domestic, agricultural and casual employments are excepted, and often those having less than a stipulated number of employees. In many States public as well as private employments are covered, but usually public officers are excluded. In some States only

casual employees are excepted, and in others one or two but not all of the above classes.

The acts generally exclude employments when the laws of the United States have provided a rule of liability for injuries received in them. Thus accidents to employees of railroads engaged in interstate commerce are not within the acts. But in some States employees engaged in an interstate business are covered if the act by which the injury was received was of a purely intrastate nature.

An employer within the meaning of workmen's compensation acts is one who engages the services of a workman and agrees to pay him therefor. There must be a contract of service, within the meaning of that term at common law.

For decisions determining the existence of the relation of employer and employee at common law, see *Master and Servant*, Cent. Dig., § 1; Dec. Dig., § 1; *Words and Phrases*, vol. 3, pp. 2369-2377; vol. 8, p. 7649.

§ 2. Contract of Employment Necessary Under the New Jersey Compensation Law.

In *Rongo v. Waddington & Sons, Inc., et al.*, 87 N. J. L. 395, 94 Atl. 408, 9 N. C. C. A. 402, Rongo was originally employed by and regularly worked for Waddington & Sons, who were contracting teamsters, letting out their teams and drivers by the day. They had a contract with Vanderbilt to haul material for him at a fixed price per team per day. Vanderbilt did not pay the drivers, but if objectionable to him Waddington & Co. would remove them. Vanderbilt directed the movements of the teams. After working ten days in this manner, on the Vanderbilt job, while taking on a load of stone, which was being dumped on to his wagon by a steam shovel Rongo's hand was caught in the jaws of the shovel and injured.

The question was which employer was liable for compensation. The court held that Waddington & Co. were liable and dismissed Vanderbilt, holding the act "inapplicable to

any relation of master and servant as generally understood at common law, other than that arising out of the contract between the master and the servant, whereby the servant engages to work for the master, and the master on his part engages to pay the servant for such work; in other words, that it is inapplicable to a condition of things where a servant employed by a master directly is required, as part of his contract of employment, to work for some other person for a compensation payable not to the servant but to the immediate master."

§ 3. A Loaned Employee.

In *Pigeon v. Employers' Liability Assurance Corporation, Ltd.*, 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516: A driver in the employment of a general employer was sent by his employer to work for a city in removing street sweepings, receiving his instructions as to how and where to work from the city superintendent. He used his employer's teams and was directed to feed and water them and was in charge of them until returned to the stable. While taking one horse to a watering trough it ran away and he was fatally injured. The question was whether the owner of the horse or the city was his "employer" within the meaning of the act. The court said: "This evidence warranted the finding that Shaw did not lend the decedent absolutely and unqualifiedly into the service of the city of Springfield, but he retained the general direction of his conduct except in so far as it was surrendered to the city, and that this retention of control included the care of the horses, at least to the extent of seeing that they were watered." It was held that Pigeon was in the service of Shaw.

§ 4. A Receiver As An Employer.

A receiver who is conducting the business of an insolvent employer is the employer during the time he conducts the business and must make payment of benefits to which injured employees are entitled under the act. *Wood v. Camden Iron Works*, 221 Fed. 1010.

§ 5. An Infant As An Employer.

An infant employer can not evade the operation of the act of 1908 on account of infancy. *Re Smith*, 17 West L. Rep. (Can.) 550.

§ 6. Employers of Less Than Five Under Connecticut Act.

Many of the acts provide that they shall have no application to employers of less than a certain number of employees. This is the only court decision regarding the liability of employers of less than five.

Mrs. Alvah Bayon was injured on May 7, 1914, while shaking a rug in the course of her employment with John G. Buckley. The commissioner of compensation made an award to her, and when the employer appealed, the superior court sent the case to the supreme court for decision on an agreed statement of facts. The employer claimed that he was not liable for compensation because the act does not apply to employers of less than five persons, and, if it were found thus to apply, that the employee was not entitled to compensation because the employer had failed to comply with section 30 of part B, requiring employers to give proof of financial ability or to insure their risks. The court decided against both these contentions, and dismissed the appeal. Judge Thayer, who delivered the opinion, discussed at length the reasons for and against the inclusion of employers of less than five persons under part B, in case they do not actively elect not to be within such provisions, and held that while the legislature intended to offer less inducements to the small employers and their employees, together with those concerned in agricultural, domestic and casual employments, it was not the expressed intention to exclude them. As to the other question he said in part:

"But the chief inducement to the employee to accept part B unquestionably is the fact that he thereby secures compensation for injuries for which the common law gives him no remedy. It is too unreasonable to believe that the legislature intended that the employer, after having ac-

cepted part B, should be able to deprive the employee of these benefits without notice by simply neglecting to comply with the provisions of the act which he had accepted. It is consistent with the language of section 42 to hold that failure by the employer to comply with section 30 deprives the employee of his benefits under Part B, but does not deprive the employee of his benefits under it, and that the latter in such case may claim compensation under the act or, in a case when the common law gives a remedy, may have his action at common law as modified by part A. This we think is the proper construction to be given to this section. It follows that compensation was properly awarded to the plaintiff." *Bayon v. Beckley*, 89 Conn. 154, 93 Atl. 139, 8 N. C. C. A. 588.

§ 7. Administrator As Employer.

"A workman who has been receiving compensation, may, upon the death of the employer, and neglect or refusal of the next of kin to take out letters, secure the appointment of an administrator so as to be able to enforce his right to compensation, since the workman can not be deprived of compensation merely because there is no one standing in the position of 'employer.'" L. R. A. 1916A (note), 113. *Re Byrne* (1910 Prob.), 44 Ir. Law Times 98, 3 B. W. C. C. 591. Who are employers, see L. R. A. 1916A, note, p. 13; also L. R. A. 1916A, note, p. 245.

§ 7a. Charitable Institutions As Employers.

In *MacGillivray v. The Northern Counties Institute For the Blind* (Eng.), 48 Sc. L. R. 811, 4 B. W. C. C. 429, 11 N. C. C. A. 77, a blind pauper was working in the industrial department of an institution for the blind. The institution was dependent upon charitable aid. The man caught his fingers in a machine. The court decided the man was a workman and entitled to compensation. The Lord President said: "He was employed under a contract of service. He was not bound to go to the institute and the institute was not bound to receive him. He stipulated that he would

give his services for what they were worth to the institute, and they in return, stipulated that they would give him board, lodging and clothing and 5s a month in money."

§ 8. Who Are Employees.

To determine whether an employee is subject to the act, it is necessary to learn whether the particular employment in which he is engaged is one subject to the law. Usually no affirmative act upon the part of the employee is necessary in order to bring him within the law. But in Kentucky he must agree to accept the act in writing with his employer.

The rules for determining the existence of the relation of employer and employee are the same as those at common law for the relation of master and servant, (See § 1.) Therefore, in order to recover compensation a contract of employment between the injured person and the employer from whom he is seeking compensation must be shown.

§ 9. Pieceworker As Employee.

One Bashko had been awarded compensation by the district court of St. Louis County for an injury which resulted in the loss of sight of one eye. He was at work for the company named in getting out ties, poles and posts from the company's timberlands, being paid by the piece according to the size, character and grade of the different articles. He could largely proceed in his own way so far as time and method of working was concerned, and the company contended that he was an independent contractor and not an employee entitled to compensation. It invoked the test laid down by the courts as to the relation of employer and employee with reference to responsibility for negligence causing injury to third persons, that is, whether or not the alleged employer had power to control the acts of the other in respect to the transaction out of which the injury arises. The court, speaking by Judge Taylor, held that the evidence in this case that Bashko was such an employee was sufficient to have required its submission

to the jury, if this had been an action at law to which the rule mentioned applied, saying in part:

"In the present case Bashko did not contract to perform a specific and definite undertaking, nor to accomplish a specific and agreed upon result. He did not agree to cut any specific quantity of timber, nor to cut the timber from any specific quantity of land. The company owned the timber and wanted it made into ties, poles and posts. It had established a schedule of prices which it paid for piecework. Bashko had worked at piecework for some years and could earn more than the ordinary wages at such work. He applied for a job getting out timber by the piece and the company set him to work. The company had a large number of men doing the same kind of work upon the same terms. It is not likely that the owners of valuable timber would permit ordinary workmen to cut and manufacture it for them wholly free from supervision or control. The evidence tends to show that the company did not surrender, but reserved, the right to supervise and control the work of Bashko, at least to the extent necessary to prevent waste and loss. They required him to cut the timber clean as he went, and to manufacture it according to specifications furnished by them, and also to pile the brush. They inspected his work from time to time and occasionally directed him to remedy defects therein. They had the right to discharge him at any time, and this right afforded adequate means for controlling his work. The evidence was ample to sustain the finding of the trial court under the rule invoked."

The court therefore held that the injured man was an employee under the workmen's compensation act, and affirmed the judgment of the court below. *State ex rel. Virginia and Rainy Lake Co. v. Dist. Ct. of St. Louis County et al*, 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076.

§ 10. Son As Employee of Father.

Evidence that a father who owned a shingle mill told his

thirteen-year-old son that he could do certain work in connection with the mill, nothing being said about the wages or compensation of the son, is not sufficient to create the relation of employer and employee, so as to constitute the son an employee within the meaning of the Washington compensation act. *Hillestad, et ux., v. Industrial Insurance Commission of Washington*, 141 Pac. 913, 6 N. C. C. A. 763.

§ 11. Employment Obtained By Misrepresentation.

It has been held that where an employee in securing employment misrepresents his name and age, that does not forfeit his right to claim compensation from the employer, especially when the misrepresentation has no direct connection with the contract of employment. *Havey v. Erie R. R. Co.*, 87 N. J. L. 444, 95 Atl. 124.

Likewise where an employee made a false affidavit as to previous similar employment and as to marriage and where neither of these representations were related to or contributed to his death, he was held to be within the New York act. The court said: "While the relation of employer and employee as defined by the statutes must have existed at the time the deceased sustained the injury, it matters not whether the employment was under a contract concededly valid as to both parties, or under a contract voidable at the election of the employer, or whether the liability of the employer was for wages fixed or determinable under *quantum meruit*. The vital question is whether the relation of employer and employee existed between the deceased and the railway company; and, the facts being conceded, the question is one of law." *Kenny v. Union Ry. Co. of New York City*, 166 App. Div. 497, 152 N. Y. Supp. 117, 8 N. C. C. A. 986.

§ 12. Extrahazardous Employments.

Many of the acts differentiate between hazardous and non-hazardous employments, making the operation of the act as to them, voluntary or compulsory as the case may be. In the States set out below the statute enumerates

certain so called hazardous or especially dangerous employments and declares that the compensation principle shall apply to them as distinguished from the unnamed or specifically exempted employments, but, in most cases, those not engaged in the named employments may voluntarily elect to operate under the acts. These States are Arizona, Kansas, Louisiana, Maryland, Montana, New Hampshire, New York, Oklahoma, Oregon, Washington and Wyoming, The statute of the State in question should be carefully examined to determine whether any specific employment is covered by it.

§ 13. Employees In Hazardous Employment Injured in Non-Hazardous Work.

The New York act enumerates certain employments which are covered by it. It was held that an employee engaged in one of the employments named in the act could recover, although actually injured while doing work not ordinarily included in such an employment, but an employee not engaged in one of the named employments can only recover when his injury occurred while actually engaged in work covered by the act. *Gleisner v. Gross & Herbener* 155 N. Y. S. 946, 170 App. Div. 37.

In *Larsen v. Paine Drug Co. et al.*, 155 N. Y. S. 759, 169 App. Div. 838, affirmed in 218 N. Y. 252, 112 N. E. 725, the facts were as follows: Kris Larsen was killed while in the employ of the company named, and his widow, Ingeborg Larsen proceeded for compensation. An award was made, and the employer and insurer appealed.

The commission found that Larsen was employed as a porter, elevator man and general utility man by the company, which was in the business of manufacturing and selling drugs, chemicals, medicines and pharmaceutical preparations at both retail and wholesale. The court held that it might reasonably be inferred that a wholesale druggist manufactured drugs. The commission further found that the employee at the time of the accident was engaged in building a shelf near an elevator well, and while reaching

into the well to obtain a board which he had placed there, fell down the shaft and was instantly killed. The court upheld the award of compensation, Judge Howard, who delivered the opinion, saying:

“A general utility man, engaged in an establishment where drugs and chemicals are manufactured, must be presumed to participate more or less in the work of the establishment. The deceased was engaged at the instant of the accident in building a shelf, but in order to do this it may have been necessary to handle the drugs and chemicals in the building; that is, move them so as to have room to build the shelf, and after it was built place them upon the shelf. In fact, the evidence before the commission shows that the deceased was required to rearrange cases and do work of that character. In *McQueeney v. Sutphen & Hyer* (153 N. Y. Supp. 554), this court said: ‘If the employee is engaged in an employment declared hazardous by this law, but at times may work in a non-hazardous employment, it is not unreasonable that the injury should be considered within the act, if the employer fails to show all the facts.’ ”

§ 14. One Department of Business Hazardous.

Under the Washington act a department store kept a repair shop where their own vehicles were kept in order. A carpenter, while turning on a switch to start an emery wheel, so that he could sharpen a tool, received a shock which caused his death. It was claimed that the general merchandising business was not hazardous within the meaning of the statute. The court said:

“If we could so construe that the extra hazardous character of the employer’s business was to be determined by the business he was principally engaged in, we might accept the finding of the commission, but the act, as we have seen, recognizes the fact that the same employer may conduct different departments of business, some of which fall within the act, some of which do not. And in this connection it matters not which is the principal business and which is

the incidental business. If the employer conducts any department of his business, whether large or small, as an extra hazardous business within the meaning and defined terms of this act, his workmen would come within the class designated by the act, and be entitled to the protection of the act." *Wendt v. Industrial Ins. Comm.* 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790. See also *State v. Business Property Co.*, 87 Wash. 627, 152 Pac. 334.

§ 15. General Illustrations of Hazardous Employments.

Harvesting ice is not a hazardous employment under the New York Act. *Aylesworth v. Phoenix Cheese Co.* 155 N. Y. S. 916, 170 App. Div. 34.

A janitor of a building who slipped and fell "while going upon the roof to perform some work on a flagpole" is not within the New York Act. *Gleisner v. Gross & Herbenet et al.*, 155 N. Y. Supp. 946.

An employe of a retail butcher while operating an electric meat chopper received injuries causing his death. It was held that he was engaged in a hazardous employment within the New York Act. *Kohler v. Frohmann et al.* 167 App. Div. 533, 153 N. Y. Supp. 559. But it was also held under the New York Act that a hotel butcher distributing meats to cooks in the hotel as ordered, was not engaged in a hazardous employment. *Dela Gardelle v. Hampton Co.*, 153 N. Y. S. 162, 167 App. Div. 617.

An employee who was injured when a horse he was removing from its stall fell on him, was engaged in a hazardous occupation, within the meaning of the New York Act. *Costello v. Taylor*, 111 N. E. 755, 217 N. Y. 179. See also *Smith v. Price* 168 App. Div. 421, 153 N. Y. S. 221.

An employee of a wholesale grocery company working in the storehouse was held not engaged in the hazardous occupation of warehousing. *Mihm v. Hussey*, 155 N. Y. S. 860, 169 App. Div. 742.

William H. Wilson was killed when he accidentally fell down an elevator shaft in the establishment of his employer, the company named. He was a porter and shipping clerk,

and incidentally operated the elevator when he had occasion to use it, there being no regular operator. The court held that the employee was included within the classification of group 41, which includes operation of vehicles otherwise than on tracks, deciding that the elevator car was such a vehicle. *Wilson v. Dorflinger*, 155 N. Y. S. 857; followed by *Chapell v. 412 Broadway Co.*, 155 N. Y. S. 858; *Cremin v. Mordecai*, 155 N. Y. S. 859; *McIntyre v. Hilliard Hotel Co.*, 155 N. Y. S. 859; *Sheridan v. P. J. Grol Const. Co.*, 155 N. Y. S. 859.

A macaroni manufacturer, engaging a carpenter by the hour, is not engaged in a hazardous business within the New York Act. *Bargey v. Massaro Macaroni Co.*, 155 N. Y. S. 1076.

A workman, constructing a manhole near a street car track, is not engaged in an extra hazardous employment within the Washington Act. *Puget Sound Traction, Light & Power Co. v. Schleif*, 220 Fed. 48, 135 C. C. A. 616.

A workman operating an ordinary elevator in a business house is not engaged in an extra hazardous employment under the Washington Act. *Guerrieri v. Ind. Ins. Comm.* 146 Pac. 608.

See 11 N. C. C. A. 320-330, for comprehensive note on classified employments

§ 16. State, County, Municipality and Governmental Agencies Under the Acts.

A number of the workmen's compensation acts have been made to apply to State, county and municipality and their political subdivisions, notably California, Connecticut, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio and Wisconsin. The Kentucky act applies to municipal corporations but not to the State or county and the Oregon act excludes municipal corporations.

A State, being a sovereign, was not liable at law for the torts of its officers or agents unless it expressly consented to be liable by legislative enactment. See 36 Cyc.

881 and 911 and cases cited. A county was generally not subject to liability for any tort unless a statute, expressly or by necessary implication imposed such liability. See 11 Cyc. 497 and cases cited. The same rule has been applied to a municipality acting in its capacity as a governmental agency. See 28 Cyc. 1257 and cases cited. Since workmen's compensation acts merely displace and enlarge the law of torts under certain conditions as between master and servant, the statute should be consulted to see whether it applies to the State, county or municipality. If the act is elective the law must also provide the manner and means of election.

§ 17. The State and Its Political Subdivisions As Employers.

The acts usually define the term "employer" and say, as in New York for example, that it includes "the State and a municipal corporation or other subdivision thereof." Laws 1914, N. Y., c. 41, art. 1, § 3.

In *Miller v. Pillsbury et al.*, 164 Cal. 199, 128 Pac. 327, 5 N. C. C. A. 899, the Supreme Court of California has considered the question of the State being an employer.

The compensation law of California, ch. 399, Acts of 1911, provided that the State and its subdivisions, and every person, firm or private corporation employing labor who elected to become subject to the provisions of the act might make premium payments to a State fund to which injured workmen should look for compensation for injuries. No machinery was provided by which the State might avail itself of its provisions, and no action was taken by it in this behalf. Fred Miller attempted to secure a writ of mandamus compelling the State Industrial Accident Board to hear his application for compensation for injuries received while employed by the State. Miller contended that the State and its municipalities were employers under the law, and that while private employees had the option of rejecting the compensation system if their employers had elected it, employees of the State had no such option; he maintained, therefore, that it was obligatory upon the State to

provide compensation under this act. This the supreme court denied, observing that no provision had been made for the State to make its election, if the law was elective as to it, nor was there any officer named to receive service of notice of injuries and claims as contemplated in the act, nor was any machinery supplied for the performance by or in behalf of the State of the duties which would necessarily result from a carrying out of the act. The statute was therefore considered as simply setting up a law under which the State might, at some time, elect to place itself when suitable provisions therefor should be provided by legislation. The writ was therefore discharged.

For a discussion of the State and other governmental agencies as employers within the meaning of workmen's compensation acts see 5 N. C. C. A. (note) 897-913; 8 N. C. C. A. 960-968.

§ 18. Administrative Boards of State As Employers.

The State Highway Commission has been held liable under the California Act. *Brett v. State Highway Commission*, Cal. Ind. Acc. Bd., 1 Nat. Comp. Journal (July, 1914), 5 N. C. C. A. 902. It was held otherwise in New York. *Allen v. State*, 160 N. Y. S. 85. The State Fire Warden's Dept. has been held liable under the Michigan Act. *Kenelly v. Stearn's Salt & Lumber Co.*, Mich. Ind. Acc. Bd. 1 Nat. Comp. Journal (July, 1914).

§ 19. State Board of Agriculture As Employer.

In *Agler v. Michigan Agricultural College*, 181 Mich. 559, 148 N. W. 341, 5 N. C. C. A. 897, Agler was an employee of the Michigan Agricultural College, which is under the control of the State Board of Agriculture. By constitutional provision, as construed by the courts, neither the legislature of Michigan or any of its officers or boards may interfere with the control of the agricultural college, vested in the State Board of Agriculture. Agler was injured and made claim for compensation as an employee of the State under Sec. 5, Part 1 of the Michigan Act. The court held that as an employee of the State Board of Agriculture,

working at the Michigan Agricultural College, he was not an employee of the State, and since the board had not voluntarily elected to come under the act, he could not recover.

§ 20. County As Employer.

A county was held liable for injury to an employee working in a gravel pit. *Popke v. Wanpaca County, Wisconsin Ind. Comm. Bul. (1912), 98, 8 N. C. C. A. (note) 960.*

§ 21. A Sheriff Not An Employee of State.

A Sheriff was held not to be an employee of the State within the meaning of the Connecticut Act. *Sibley v. State, 89 Conn. 682, 96 Atl. 161.*

§ 22. Board of Park Commissioners As Employer.

A park caretaker, employed by the Park Commissioners, who were a board acting under the direction and control of the City Council of Superior, received injuries in the course of his employment, from which he died. The Wisconsin Act brings "the State and each county, city, town, village and school district" within the definition of the term "employer." The deceased was held to be an employee of the city and entitled to compensation. *City of Superior v. Industrial Commission et al., 160 Wis. 541, 8 N. C. C. A. 960.*

§ 23. Town or Contractor As Employer.

A contractor had an agreement with the town of Superior to build a bridge. He was to select his own men and furnish the machinery and teams to do the work for which he was to be paid, and he was to be paid a given rate per day per man for the balance of the crew. An employee was injured and the question was whether he was an employee of the contractor or the town. The board said: "We conclude that Zachau was the agent of the town for the selection of the crew and that the crew selected were the employees of the town." *Peabody v. Town of Superior, Wis. Ind. Comm. Bul. (1912), 99, 8 N. C. C. A. 961.*

§ 24. Pupil In Manual Training High School As Employee of City.

A high school boy working in a manual training department of a school on Saturday for pay at the direction of the principal, with the knowledge and acquiescence of the school board, was held to be an employee of the city of Appleton under the Wisconsin Act. *Schmitz v. City of Appleton*, Wis. Ind. Comm. Bul. (1913) 31, 8 N. C. C. A. 962.

§ 25. Board of Public Works As Employer.

A street sweeper who was run down and injured by a vehicle on the public streets where he was directed to work was allowed to recover from the city. It was argued that he was an employee of the Board of Public Works and not the city. *Purdy v. Sault Ste Marie*, Mich. Ind. Acc. Bd. 5 N. C. C. A. 905.

§ 26. Village As Employer of Citizen Assisting Marshal.

A man was working as a plumber and was asked by a village marshal to assist some officers in charge of an offender. While assisting in the arrest he was killed. It was held that by the invitation of the marshal he became an employee of the village and was therefore entitled to compensation. *Village of West Salem v. Ind. Com.* 162 Wis. 57, 155 N. W. 929.

For note on Municipal Corporations as employers, see 5 N. C. C. A. 904-912, 8 N. C. C. A. 960-968.

§ 27. Policemen and Firemen As Employees.

The provisions of the act in question, having to do with employees of the municipality, State or governmental agencies must be consulted before determining this question.

The reasoning which has determined whether policemen are within the act or not is: Are they public officers or employees of the city. If public officers, the act does not apply to them. In *Blynn v. City of Pontiac*, 185 Mich. 35, 151 N. W. 681, 8 N. C. C. A. 793, the court said: "The decision

of the Industrial Board can be affirmed only if it is found that a policeman of the city of Pontiac, under the facts stipulated, is an employee and not a public officer. Policemen generally are charged with the especial duty of protecting the lives of citizens within certain territorial limits, and of preserving the public peace. The preservation of the public peace being a matter of public concern, it has therefore been said that policemen may be considered as public officers. As a rule, they are appointed under authority given by the State, and therefore have generally not been regarded as servants or agents or as otherwise bearing a contractual relation to the municipality. *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, Ann. Cas. 1913B, 1078." The court held in this case that as public officers policemen were not "employees" within the scope of the act. The court cited *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 197. In this case the Kentucky Court of Appeals in unmistakable terms held that both policemen and firemen were "public officers."

In Minnesota both policemen and firemen were held to be within the coverage of the act. The case of *Blynn v. City of Pontiac* (supra) was discussed by the court, but was held to have no bearing in Minnesota on account of a provision of the Minnesota Act which seems to be peculiar to that State. In *State ex rel. City of Duluth v. Dist. Court of St. Louis Co. et al.*, — Minn. —, 158 N. W. 790, wherein a policeman was held within the act, the court said: "The question before us is different. It is not whether a policeman is an officer or an official, but whether he is 'an official . . . elected or appointed for a regular term of office.' Clearly he is not. A 'regular term of office' signifies a definite period of time. . . . Under the Duluth charter policemen receive their office by appointment under civil service rules. They hold office during good behavior. There is no term at all. Manifestly this is not an appointment for 'a regular term of office.'"

In *State ex. Rel. City of Duluth v. Dist. Court of St.*

Louis Co. et al.—Minn.—, 158 N. W. 791, a fireman was held to be within the Minnesota Act for the same reasons given in the preceding case concerning a policeman.

The English cases concerning policemen are not in point because the English Act in so many words excludes policemen. Section 13, Acts 1906. The Wisconsin Act includes policemen, Acts 1913, §§ 2394, 2397.

§ 28. Who Are Independent Contractors.

Independent contractors are not covered by Workmen's Compensation Acts generally and they can not claim its benefits against their principals (L. R. A. 1916A (note) 247; 7 N. C. C. A., 1076). The question to be determined is whether they are employees or independent contractors. That question is usually settled by the decisions on this point at common law. In *Mason & Hodge Company v. Highland*, 116 S. W. 320, the Kentucky Court of Appeals has presented a satisfactory test when it said: "Who has the general control of the work? Who has the right to direct what shall be done? Who shall do it and how it shall be done? If the answer to these queries shows that this right remains in the employer, the relation of independent contractor does not exist between the contractor and the employer. On the other hand, if the employer has not this privilege it does exist."

The following definition of independent contractor is given in 26 Cyc. 970: "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work."

§ 29. An Independent Contractor As An Employee.

In *Powley v. Vivian & Co.*, 169 App. Div. 170, 154 N. Y. Supp. 426, 10 N. C. C. A. 835, Powley agreed to do certain dredge work for Vivian & Co. He was to furnish his own dredge and operate it and the company was to furnish supplies. While going for supplies in a launch, there being





no one else to go, he was injured. The court held that as an independent contractor Powley was not covered by the act, but that in going for supplies for the company he was an employee and entitled to compensation.

In *Rheinwald v. Builders' Brick & Supply Co.*, 168 App. Div. 425, 153 N. Y. Supp. 598, Rheinwald was painting a sign on the walls of a building owned by the defendants. He was doing the work alone under written contract as to quantity of materials and workmanship and was to be paid in a lump sum for the job. He was killed and his wife demanded compensation. The Builders' Brick & Supply Co. maintained that he was an independent contractor and not an employee. The commission upheld this view by a vote of three to two. But the court in the above decision reversed their ruling, but by a divided court. This decision seems rather out of line with those defining the term independent contractor. Judge Woodward, delivering the majority opinion, said in part:

"Was Rheinwald an 'employee,' in fairness and in fact, within the meaning of the workmen's compensation law? Was he of the grade and status of worker, rather than of the grade and status of independent enterpriser? I am of opinion that he was, and that such a holding is essential to effectuate the purpose of the act, in transmitting the burden of this bereavement from the scanty purse of this workingman's widow and children to all the patrons of the product or service furnished by his employer. The fact that he was to be paid a lump sum or 'by the job' can not be recognized as taking him out of the class of 'employee.' The fact that his contract to do the work was in writing is not decisive on that issue, or the fact that by it he made certain undertakings of satisfaction of the employer or replacement if the finished work did not endure an expected length of time. The fact that his employment by the respondent was casual or intermittent can not deprive him of the status of employee, in the absence of explicit legislative pronouncement to that effect. The fact

that he furnished tools or materials, or undertook to do a specified 'job' or produce a given result, does not prevent his being in fact a workman, an 'employee,' within the purview of this statute. Common sense and regard for the actualities should be potent on this issue, rather than technical distinctions and elaborate refinements. Rheinwald really was a worker; the sum he received for his painting was in an economic sense wages, and not profits; he had no helpers, on whose work he made a profit; he was not an employer, with employees whom it was his duty to insure under the act; he personally performed all the work; it was contemplated by the employer that he would; and the employer had at least potential control, direction and supervision of all the work Rheinwald did at his trade for the respondent."

The contrary was held in New Jersey in *Kennedy v. David Kaufman & Sons Co.*—(N. J.)—, 91 Atl. 99. The court said: "What the plaintiff claims is that in all cases where the entire work is left to an independent contractor the employer is liable for defects in ways, works, machinery or plant belonging to or furnished by such independent contractor. This is not the proper construction of the statute, but, on the contrary, the employer is only liable where he furnishes the ways, works, machinery or plant in aid of part execution of his work, and does not make him liable where the entire work is left to an independent contractor, who furnishes the ways, works, machinery or plant, over whose negligent conduct in not remedying defects the employer has no control."

The Massachusetts Act provides (State 1911, C. 751, Part 3, § 17) that if an employer under the act enters into a contract with an independent contractor to do his work, he is liable to the employees of the independent contractor just as if they were his own employees and this is true whether the independent contractor is a subscriber to the act or not. See *In re Sundine*, 218 Mass. 1, 105 N. E. 433, 5 N. C. C. A. 616.

In *State ex rel Virginia & Rainy Lake Co. v. Dist. Ct. of St. Louis County*, 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076, the court held that a pieceworker named Bashko was an employee and not an independent contractor. The law of Minnesota was summed up by the court in the following headnote:

"The test for determining whether one person is the employer of another within the rule making the employer responsible for injuries resulting from the negligence of his employees, is whether such person possessed the power to control the other in respect to the transaction out of which the injury arose."

§ 30. Vaudeville Actress As Independent Contractor.

A vaudeville actress, employed on a salary, though furnishing her own costumes and stage materials, was held an employee and not an independent contractor. *Howard v. Republic Theater*, 2 Cal. Ind. Acc. Comm., Dec. (1915), 514.

§ 31. A Lather As Independent Contractor.

A workman, who agreed to put on laths at 25 cents a bunch and who employed others to help him at the same rate, all working under the direction of the foreman with whom the agreement was made, was held a mechanic and not an independent contractor. *Jones v. Commonwealth*, 2 Mass. Workm. Comp. Cas. (1914) 721.

§ 32. A Teamster As Independent Contractor.

A teamster who did general hauling was hauling bags of cement for a company at 25 cents per trip. He strained his back. Upon making claim he was held to be an independent contractor. *In re Stull*, Ohio Ind. Comm. (No. 117139), Oct. 4, 1915.

§ 33. A Whitewasher As Independent Contractor.

A whitewasher entered into a contract to do a job of whitewashing for a certain price and to furnish the necessary material and labor. He was injured while doing this work and was held to be an independent contractor and

not entitled to compensation. *McDermott v. Grindal & Sons* Ill. Ind. Bd., Aug. 3, 1914.

§ 34. A Quarryman As Independent Contractor.

A quarryman, furnishing his own blasting materials and teams and paid by the cord was held to be an employee and not an independent contractor. *Ross v. Moore*, Ill. Ind. Bd., Nov. 6, 1914.

§ 35. A Taxicab Driver On Shares As Independent Contractor.

A taxicab driver, receiving one-fourth of the proceeds for his services in operating the company's car, was an independent contractor and not an employee under the English Act. *Smith v. General Motor Cab Co. Ltd.* 80 L. J. K. B. 839, 1 N. C. C. A. 576.

For exhaustive notes on the relation of employer and independent contractor under the acts, see 7 N. C. C. A. 1076-1097; 10 N. C. C. A. 835-852.

The following recent decisions discuss the question whether a workman is an employee or an independent contractor within the meaning of Workmen's Compensation Acts: *Donlon Bros. v. Ind. Acc. Comm.* (Cal.), 159 Pac. 715; *Western Indemnity Co. v. Pillsbury et al* (Cal.), 159 Pac. 721; *In re. Contractors' Mutual Liab. Corp'n*, 113 N. E. 460 (Mass.); *Dyer v. James Black Masonry & Contracting Co.*, 158 N. W. 959 (Mich.); *Tuttle v. Embury Martin Lumber Co.*, 158 N. W. 875 (Mich.); *Hartell v. T. H. Simonson & Son Co.*, 218 N. Y. 345, 113 N. E. 255; *Carstens v. Pillsbury et al* 158 Pac. 218 (Cal.); *Perham v. American Roofing Co. et al* 159 N. W. 140 (Mich.).

§ 36. Relation of Contractors and Subcontractors.

A number of the acts provide that under certain conditions contractors shall be liable for compensation due to employees of subcontractors. The aim of such provisions is to guarantee compensation to all of the employees on a job let to a general contractor for the reason that sub-

contractors are often not financially able to meet the demands of workmen's compensation acts.

In some States the employee of the subcontractor, for the purposes of compensation, is made the employee of the general contractor and intermediate contractor just as if a contract of service had been entered into directly between them, and together with the immediate employer are jointly and severally liable for compensation to the injured employee. Examples of such acts are Illinois Act, 1913, § 31; Kansas Laws, 1911, c. 218, § 4; Massachusetts Laws, 1911, c. 751, Part III., § 17; Nevada Laws, 1911, c. 183, § 10.

In Indiana Laws, 1915, c. 106, § 14, and Kentucky Laws, 1916, c. 33, § 10, the principal, contractor or intermediate contractor is made liable to the same extent as the immediate employer, but the claim must first be instituted against the immediate employer and the injury must have occurred on the premises where the principal contractor is at work or on those controlled by him.

Since, under these last mentioned acts, the contractor is only liable "to the same extent as the immediate employer," it seems that there could be no liability for compensation to the employee of a subcontractor who rejects the act, such employee would have his common law action with the defenses of the immediate employer removed. His relation to the principal contractor would be the same as before the act was passed. It was held in England that the principal will not be held liable for compensation to a man who has no claim against the contractor. *Marks v. Carne*, 2 K. B. 516, 25 Times L. R. 620, 2 B. W. C. C. 186, L. R. A. 1916A (note) 95.

In all of the above mentioned States the contractor paying compensation has the right of indemnity from the one causing the injury.

§ 37. Casual Employment In General.

Out of the thirty-four Workmen's Compensation Acts in force in the United States twenty-three expressly except "Casual Employment" from their operation. This is true in

California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, West Virginia, Wisconsin and Wyoming. In Kentucky the employee must be "regularly engaged," and thus conversely this act does not apply to casual employments.

Casual employment is a question of fact, the determination of which is largely influenced by the circumstances of the contract of employment and the nature and duration of the work to be done. A definition if attempted would prove too narrow to meet the connection in which the phrase is used in some acts, or too broad in others, as the case might be. In order to determine, therefore, whether a particular employment is casual or not the phraseology of the act in question must be carefully noted. For instance, the Nebraska Act provides that "casual" shall mean "occasional, coming at certain times without regularity in distinction from stated or regular." Laws Neb., 1913, c. 198, pt. 2, § 15 (3).

§ 38. A Definition of "Casual Employment."

The New Jersey Supreme Court in *Sabella v. Brasileiro* 86 N. J. L. 505, 91 Atl. 1032, 6 N. C. C. A. 958, said: "The ordinary meaning of the word 'casual' is something which happens by chance and an employment is not casual—that is, arising through accident or chance—where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period." See also *Dyer v. James Black Masonry & Contracting Co.*—Mich.—, 158 N. W. 959.

§ 39. Tests As To Whether Employment Is Casual Or Not.

In a note on the question of casual employment within the meaning of the various Acts in 6 Negligence and Compensation Cases Annotated 958, the editor has summarized the effect of the decisions concerning the question of casual employment as follows:

"The nature of the agreement between the workman and the employer is the controlling factor in determining the character of the employment as casual or not. It has been suggested that a proper test of whether or not the employment is casual is: If, by the agreement between the employer and the workman, the workman undertakes to work for the employer at fixed times or for definite periods separated by intervals—that is, if the workman has the right to come and is expected to come to work at those times without being specially engaged from time to time—the employment is not casual. If, on the other hand, the employment ceases at the end of each period of work, in the sense that the workman would not be expected to work again for the employer without a new engagement, the employment is casual. But where the work is more or less regular, although separated by intervals, the employer should not, and probably would not, be allowed to escape liability by adopting a system of hourly or daily engagements. It is apparently along these lines of distinction that the English decisions have proceeded. See Elliott, *Workmen's Compensation Act* (6th Ed.), P. 277. See also the cases cited in 4 N. C. C. A. 502-507," and 6 N. C. C. A. 958-963 and 11 N. C. C. A. 366-384.

§ 40. Employment For One Occasion Is Casual.

In *Gaynor, Admrx, etc., v. Standard Accident Insurance Co.*, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363, 4 N. C. C. A. 502, a firm of caterers did not have any regular waiters in their employ, but engaged men who followed that occupation as the occasion arose. While serving this firm as a waiter at a banquet Joseph Gaynor received an injury by accident from which he died. In reversing the decision of the Massachusetts Industrial Board the court said:

"It would be difficult to conceive of employment more nearly casual in every respect than was that of the employee in the case at bar. The engagement was for a single day and for one occasion only. It involved no obligation on the part of the employer or employee beyond the single in-

cident of the work for four or five hours at the college. That would have had its beginning and ending, including outward and returning journeys (but for the unfortunate accident), within a period of less than twenty-four hours. The relation between the waiter and the caterer had no connection of any sort with any events in the past. Each was entirely free to make other arrangements for the future, untrammelled by any expressed or implied expectations of future employment. The employment was not periodic and regular as in *Gillen's case*, 215 Mass. 96, 102 N. E. 346." See also *In re King*, 107 N. E. 959, 220 Mass. 290.

§ 41. Intermittent Employment May Be Casual.

Whether or not intermittent employment is casual would seem to depend upon the frequency and duration of the work performed.

The employment by a coal dealer of a teamster with his horses and wagon, to deliver coal, is casual where the evidence showed that at one period he had been employed for five days, and about a year afterward was employed for a period of eight days which were not consecutive, and the teamster was hired for no fixed duration of time and for no specific job, but only when called upon. *Cheevers' case*, 219 Mass. 244, 106 N. E. 861, L. R. A. 1916A, note 248.

A longshoreman was frequently called on to serve a firm of ship owners in unloading their ship. The court said: "While this class of work was not constant, depending on there being a ship of the prosecutor in port, it appears that the deceased was frequently called upon by the prosecutors to serve them in this particular character of work, being one of a class of stevedores ready to respond when called. We think this supports the finding that the employment was not 'casual' within the meaning of the word as expressed in the statute." *Sabella v. Brasileiro*, 86 N. J. L. 505, 91 Atl. 1032, 6 N. C. C. A. 958. See also *Clements v. Columbus Saw Mill Co.*, Ohio Ind. Comm. No. 101, Oct. 21,

1914, 6 N. C. C. A. (note) 959; *Dyer v. James Black Masonry & Contracting Co.*, — Mich. —, 158 N. W. 959.

§ 42. Employment For An Indefinite Period Not Casual.

When the employment is of indefinite duration it is generally not considered casual.

Where an employee when he was engaged was told that he "might get through tonight, you might not for a week, or two or three days," it was held that he was not a casual employee. *Grogan v. Frankfort General Ins. Co.*, Massachusetts Industrial Accident Board, 6 N. C. C. A. 961, note.

A workman employed for an indefinite period at \$5.00 per day, to work on a contract for the erection of a structural steel building is not in a casual employment. *Scott v. Payne Bros.*, 85 N. J. L. 446, 89 Atl. 927, 4 N. C. C. A. 682, L. R. A. 1916A, note 248,

The employment was not casual where the petitioner testified that the employer told him to "come Monday morning, I will give you some work to shave the skins;" that the pay was to be so much a dozen, and more if better work was done. *Schaeffer v. De Grottola*, 85 N. J. L. 444, 89 Atl. 921, 4 N. C. C. A. 582, L. R. A. 1916A, note 248. See also *In re McAuliffe*, Ohio Ind. Comm. Oct. 9, 1914, 6 N. C. C. A. (note) 958.

§ 43. Failure to Stipulate Wages Does Not Make Employment Casual.

A workman applying for work was asked if he understood the use of saws, to which he replied that he did, and he was put to work without any agreement as to the amount of wages which he was to receive. On the same day that he started to work he was injured by one of the saws. It was contended by the employer that the workman had deceived him as to his representations that he understood the use of saws. The employer also contended that he was a mere casual employee in any event, because there was no agreement concerning wages. It was held that the work-

man was not a casual employee and that he was entitled to compensation, at least the minimum amount specified in the statute of five dollars a week, for the number of weeks specified in the act for the loss of a thumb and the partial loss of the use of the first finger and the loss of the use of the fourth finger. *Mueller v. Oelkers Mfg. Co.* (Essex Common Pleas, February, 1913), 36 N. J. Law J. 117, 6 N. C. C. A. (note) 960.

§ 44. Acts Outside Line of Duty Under Orders of Superior Not Casual Employment.

Arthur Howard was injured in the employ of the Edison Electric Illuminating Co., and the insurer claimed that the employment was casual. This contention was based upon the fact that Howard's employment being to trim trees to keep the wires of the company clear, he was at the particular time of the accident trimming a tree through which none of its wires ran. He was acting, according to the statement of agreed facts, under the orders of his foreman, who in turn was acting under the orders of the superintendent of the company. The court upheld a decree granting compensation, saying:

"In the present case Howard was employed to trim trees, and was to receive his orders from the company through Kennedy. It was no part of his business to inquire into the right of the company to trim any particular tree. He was to receive his orders from Kennedy and to obey them. At the time he was hurt he was doing what he had been hired to do. The work was not casual." *In re Howard*, 218 Mass. 404, 105 N. E. 636, 5 N. C. C. A. 449.

§ 45. "Employment of a Casual Nature."

The English Act uses the above words instead of those commonly used in the American acts relative to casual employment. In the case of *Hill v. Begg*, 2 K. B. 802, 99 L. T. Rep. 104, 24 T. L. Rep. 711, 77 L. J. K. B. 1074, 1 B. W. C. C. 320, 4 N. C. C. A. 502, the court in interpreting the meaning of these words, said: "The words are not

'who is casually employed,' but 'whose employment is of a casual nature.' I have to investigate what is the character of the man's employment, not what is the tenure of the employment. Is the employment one which is in its nature casual? To take an analogy or illustration from a different subject, say land. The question is what is the nature or quality of the land—is it, for instance, building land or agricultural land—not what estate is held in the land. Suppose that a host, when from time to time, when he entertains his friends at dinner or his wife gives a reception or a dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social obligations of the host whether he gives any, and how many, dinner parties or receptions, and the number of men he will want will vary with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature."

For note on casual employment under the English Act see L. R. A. 1916A, 120. In relation to it see also L. R. A. 1916A, 96—for note on "In the course of or for the purpose of the employer's trade or business."

§ 46. English and American Acts Distinguished As To Casual Employment.

In the preceding section it was said that the English Act uses the words "employment of a casual nature," and . . . "otherwise than for the purposes of the employer's trade or business." Some of the American acts merely use the words "casual employment," but out of the twenty-three acts, excepting casual employment from their operation fifteen of them use in connection with the phrase "casual employment," the phrases "or not in the usual course of trade," "and not in the ordinary course of business," "and not for the purposes of the employer's trade,

business, occupation or profession," "or otherwise than for the employer's business," or phrases substantially like the above. The States using one or the other of the above phrases which can be said generally to be of the same import, are Illinois, Indiana, Wisconsin, California, Ohio, Pennsylvania, Connecticut, Hawaii (Ter.), Maine, Massachusetts, Michigan, Minnesota, Vermont, Wyoming and Rhode Island.

It will be seen, therefore, that there is a distinction between the meaning of casual employment under the British Act and under the American acts. This distinction is well drawn in the case of *Gaynor v. Standard Accident Insurance Co.* 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A 363, 4 N. C. C. A. 502, where the court said:

"As is pointed out in *Hill v. Begg* (1908), 2 K. B. 802, at P. 805, its words descriptive of the workman are not one whose employment is but casual, but one "whose employment is of a casual nature, and . . . otherwise than for the purposes of the employer's trade or business." This difference in phraseology can not be treated as unintentional, but must be regarded as deliberately designed. See Report of Massachusetts Commission on Compensation for Industrial Accidents, 53. Manifestly its effect is to narrow the scope of our act as compared with the English Act. No one whose employment is "casual" can recover here, while there one whose employment is "of a casual nature" comes within the act, provided it is also for the purpose of the employer's trade or business. It is possible that a distinction as to the character of the employment may be founded upon the difference between the modifying word "casual" used in our act, and the words "of a casual nature" in the English Act. The phrase of our act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while in the English Act the nature of the service rendered is the decisive test. This distinction appears to have been made the basis of decision in *Knight v. Bucknill*, 6 B. W. C. C. 160. This consideration is to be noted because the English Act was

followed in many respects closely by our act, and hence even slight differences of phraseology may be assumed to have signification." See also *Blood v. Ind. Acc. Comm.* (Cal. App.) 157 Pac. 1140.

§ 47. Employment Casual and Not In the Usual Course of the Trade, Business, Profession or Occupation.

In a number of the acts this phrase or one of similar import is used in connection with the word "casual." Construing this phrase the Minnesota court in *State ex Rel City of Northfield v. Dist. Court of Rice Co.*—Minn.—, 155 N. W. 103, 11 N. C. C. A. 366, said: "The language of the statute leaves no room for construction. Though casual, if the employment is in the usual course of the business of the employer, the compensation act applies. The Minnesota Act is in this respect modeled on the British Workmen's Compensation Law, which has been similarly construed. . . Part of the business of a municipal corporation is the improvement and repair of its public streets. Respondent, when injured, was an employee of the relator and engaged in this work. The compensation act applies."

§ 48. Domestic Employment.

Employees engaged in domestic employments are, almost universally, expressly excluded from the operation of the acts. There are not any reported decisions defining the term "domestic employment" under acts in force in the United States.

Under the common law a domestic is a servant or hired laborer residing with a family. 10 Am. and Eng. Ency. 4. In *Wakefield v. State*, 41 Tex. 558, the court said: "Domestics, as defined by Bouvier in his law dictionary, are those who reside in the house with the master they serve, the term does not extend to workmen and laborers employed out of doors. By Webster a domestic is a servant or hired laborer residing with a family."

"Servants and domestics" were defined in *Cook v. Dodge*, 6 La. Ann. 276, to be, "those who receive wages and

stay in the house of the person paying and employing them, for his service or that of his family; such are valets, footmen, cooks, butlers and others who reside in the house."

A page boy in a hotel, who sleeps on the premises, and who is principally employed as a messenger, but partly also to assist in dusting the reception rooms, is not within the exemption in § 10 in favor of "any person wholly employed as a domestic servant." *Savoy Hotel Co. v. London County Council*, 1 Q. B. 665.

Domestic means attached to the occupations of the home or the family, pertaining to home life, or to household affairs or interests. *Century Dict.*, 14 Cyc. 828.

§ 49. Agricultural Employment.

Farmers or agriculturists and laborers employed in agriculture are expressly excepted from the operation of almost all of the acts.

In *Keaney v. Tappan, et al.* 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556, Tappan was a market gardener, who employed, besides farm laborers, four drivers and four drivers' helpers, who delivered his produce to the city. Keaney was engaged exclusively in farm labor. At the time of the injury he was on the top of a load of hay, gathered for use on Tappan's farm. Tappan elected to operate under the Massachusetts act in so far as his four drivers and their helpers were concerned, and he took out a policy insuring them under the act. He was exempted by the terms of the act as to all of his employees in agricultural work. The court said: "The Workmen's Compensation Act was not intended to confer its advantages upon farm laborers, or to impose its burdens upon farmers. St. 1911, c. 751, pt. 1, art. 2. The legislative policy of exempting them from statutory benefits and liabilities established in addition to those of the common law disclosed in the Employers' Liability Act, St. 1909, c. 514, art 142, has been continued in the Workmen's Compensation Act. A farmer employing laborers in agriculture suffers no harm in not undertaking to become a subscriber under the Workmen's Compensation

Act. Hence, it is apparent that a farmer who chooses to avail himself of its terms and thereby to confer the boon of its protection upon his employees, does so on other grounds than those which might actuate the manufacturer or other employers of labor. . . . The act is a practical measure designed for use among a practical people. There appears to be no reason for saying that a farmer may not adopt it if he desires. Any contract of insurance made by him under its terms is valid and enforceable. On the other hand, if he does not desire to make it available, for all of his employees, there is no insuperable objection to his undertaking an insurance for a limited portion of them. If there are those, separable from others by classification and definition, whose labor is more exposed or dangerous or whom he may desire to protect for any other reason, there is nothing in the act reasonably interpreted to show why he may not do so. . . . The exemption applies to all farmers so far as concern farming operations whether carrying on other business or not."

See also *Uphoff v. Ind. Bd. of Ill.*, 111 N. E. 128, 271 Ill. 312.

"Agriculture is the art or science of cultivating the ground, especially in fields or in large quantities, including the preservation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding and management of live stock; tillage; husbandry; farming." 2 Am. and Eng. Ency. 26. The above definition from Webster was quoted in *Dillard v. Webb*, 55 Ala. 474.

"In its general sense the word also includes gardening and horticulture. 2 C. J. 988, citing *Simons v. Lovell*, 7 Heisk (Tenn.) 510; *Benzel v. Grogan*, 67 Wis. 147, 150, 29 N. W. 895.

"A person is actually engaged in the science of agriculture when he derives the support of himself and his family in whole, or in part, from the tillage and cultivation of the fields. He must cultivate something more than a garden though it may be much less than a farm. If the

area cultivated can be called a field, it is agriculture, as well in contemplation of law as in the etymology of the word. And if this condition be fulfilled, the uniting of any other business, not inconsistent with the pursuit of agriculture, does not take away the protection of the act." *Springer v. Lewis*, 22 Pa. 191, 193.

In *Coleman v. Bartholomew* — App. Div.—, 161 N. Y. Supp. 560, the court in defining farm laborers, said: "The common hired man on a farm is required to perform a great variety of work. His duties are not confined to plowing, planting and harvesting. Tilling the soil and garnering in the crops may be the principal work of the farm laborer, but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harness, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new point on a plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market and innumerable other familiar duties.

Is the hired man, who pounds his finger while shingling the pig pen, any the less a 'farm laborer' than when he pounds his finger while building a fence? It is the duty of a farm laborer to build a load of hay; it is likewise his duty to help shingle the barn to protect the hay from the elements. Both processes are necessary in order to preserve the hay. Both are essentially within the scope of the duties of the farm laborer, and it makes no difference in principle whether he breaks his leg by falling from the roof of the barn or the load of hay."

case of *Laura Staley, Admr., etc., v. Illinois Central R. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A, 450. The court held that the Federal Employers' Liability Act covered the entire field of compensation for injury to employees engaged in interstate transportation by rail, and a State compensation act is therefore not applicable in case of injury to such employee, without negligence on the part of the employer, although no provision may be made for such cases by the Federal act. To the same effect is *Smith v. Ind. Acc. Comm.*, 26 Cal. App. 560, 147 Pac. 601.

NOTE.—See further and compare with decisions of U. S. Supreme Court handed down after this book was in print and quoted in full in § 265, Post.

§ 53. *Winfield v. New York, C. & H. R. R. Co.*

In *Winfield v. New York C. & H. R. R. Co.*, 216 N. Y. 284, 110 N. E. 614, 10 N. C. C. A. 916, the court took a view opposite to the *Staley* case (*supra*). The views of the court are summarized as follows:

The Federal Employers' Liability Act provides a method of compensation for employees of interstate carriers only where the injury resulted from the employer's negligence. Workmen's compensation acts provide a remedy regardless of negligence. Upon the principle that where Congress has chosen to keep silent, the States may legislate in regard to the control of interstate carriers by rail within their borders, the New York court held that when an employee of an interstate carrier by rail was injured without negligence on the part of the carrier, the New York Act applied, while the converse was true if the carrier was negligent. To the same effect, see *Hammill v. Pennsylvania R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

The above cases illustrate the divided opinion of the courts on this subject. A complete discussion of all of the cases concerning this question can be found in L. R. A. 1916A (note), 461-465; also 9 N. C. C. A. (note) 286-307, 6 N. C. C. A. (note) 920-933, 10 N. C. C. A. (note) 916-925.

NOTE.—See further and compare with decisions of U. S. Supreme Court handed down after this book was in print and quoted in full in § 265, Post.

§ 54. Admiralty Law As Affected By Compensation Acts.

In *State of Washington, Ex. Rel. Frank Jarvis v. Daggett et al.* —, Wash. —, 151 Pac. 648, L. R. A. 1916A, 446,

The first of these is the fact that the United States is a young nation, and that its history is a history of growth and development. The second is the fact that the United States is a nation of immigrants, and that its history is a history of the struggle for a better life. The third is the fact that the United States is a nation of free men, and that its history is a history of the struggle for freedom. The fourth is the fact that the United States is a nation of peace, and that its history is a history of the struggle for peace. The fifth is the fact that the United States is a nation of progress, and that its history is a history of the struggle for progress. The sixth is the fact that the United States is a nation of justice, and that its history is a history of the struggle for justice. The seventh is the fact that the United States is a nation of love, and that its history is a history of the struggle for love. The eighth is the fact that the United States is a nation of hope, and that its history is a history of the struggle for hope. The ninth is the fact that the United States is a nation of faith, and that its history is a history of the struggle for faith. The tenth is the fact that the United States is a nation of courage, and that its history is a history of the struggle for courage. The eleventh is the fact that the United States is a nation of strength, and that its history is a history of the struggle for strength. The twelfth is the fact that the United States is a nation of wisdom, and that its history is a history of the struggle for wisdom. The thirteenth is the fact that the United States is a nation of power, and that its history is a history of the struggle for power. The fourteenth is the fact that the United States is a nation of glory, and that its history is a history of the struggle for glory. The fifteenth is the fact that the United States is a nation of honor, and that its history is a history of the struggle for honor. The sixteenth is the fact that the United States is a nation of respect, and that its history is a history of the struggle for respect. The seventeenth is the fact that the United States is a nation of dignity, and that its history is a history of the struggle for dignity. The eighteenth is the fact that the United States is a nation of pride, and that its history is a history of the struggle for pride. The nineteenth is the fact that the United States is a nation of honor, and that its history is a history of the struggle for honor. The twentieth is the fact that the United States is a nation of glory, and that its history is a history of the struggle for glory.

the court said: "The case presents the question whether a seaman employed upon a boat operating upon Puget Sound, and engaged in intrastate commerce, is covered by the provisions of the industrial insurance or workmen's compensation act. . . . It will thus be seen that Art. 4283 of the Federal statutes limits the liability of the owners of a vessel. This limited liability becomes the extent of recovery. Beyond the liability as limited by the statute there can be no recovery. The Workmen's Compensation Act limits the amount for which an employer may become liable as specified in the act. The Congress of the United States, having passed a law which limits or measures the extent of the liability of the owner of a vessel to a workman who has sustained an injury, the legislature would not have the power to fix another and different standard or measure."

The contrary was held in *Re Walker*, 215 N. Y. 529, 109 N. E. 604, in that case because of the fact that articles 24 and 256 of the Judicial Code of the United States provide that admiralty jurisdiction is not exclusive but allows also the common law remedy wherever possible, and, because the Workmen's Compensation Act is a substitute for the common law remedy, the court held that the New York Act applied to a workman who was injured while working upon a navigable river. The court said: "But it is argued that the act purports to grant exemption from further liability to those who comply with it, and that as such exemption is not effectual in the case of employers whose property may be proceeded against in admiralty, it is as to them a denial of the equal protection of the laws. The exemption, however, is from suits at common law, of which all employers complying with the act equally have the benefit. If another remedy remain, it results from the nature of the case, and not from any attempt at discrimination on the part of the legislature. All in the same case are treated alike. Employers in the situation of the appellant are subjected to two remedies now, precisely as they were before the passage of the act. A new remedy has been substituted for the

common law remedy, from which the employer is granted exemption."

In the *Fred E. Sander*, 208 Fed. 724, 4 N. C. C. A. 891, it was held that the Washington Workmen's Compensation Act did not supersede the right of workmen to proceed in admiralty against a vessel for an injury sustained. But in the *Fred E. Sander*, 212 Fed. 545, 5 N. C. C. A. 97, the same court held that where an injured employee has made claim for and received compensation under the act, he can not thereafter proceed in admiralty against the employer for the same injury. In that case the facts were as follows:

James A. Thompson brought action in admiralty against the vessel named for damages for personal injuries received by him. In his libel the employee admitted the receipt of \$360 from the Industrial Insurance Commission of the State of Washington, but averred that the same was a gratuitous payment out of a fund provided by the State, that the defendant had never contributed anything to said fund, and that the amount was in no manner accepted as payment for the injuries. In taking exceptions to the libel the defendant contended that the receipt of this money under the compensation act constituted an election which barred the bringing of an action, and the court upheld this contention. Judge Neterer, who delivered the opinion, said:

"The common law right of action being withdrawn, it is immaterial whether payment has been made by the employer to the 'accident fund' or not. The fact that the defaulting employer is not protected against actions for injury in case of default of payment after demand will not defeat the injured workman's right to take under the act, should he so elect.

But for the enactment of the Workmen's Compensation Act of the State of Washington, libellant would have two remedies; one his common law action for damages against the owners, and the other a proceeding in admiralty. The selection of the one remedy would bar a proceeding in the other. A party can not enforce both remedies, and will be

required to elect whether to pursue his common law remedy or proceed in admiralty. The Workmen's Compensation Act, while it took away the common law action, provided in its stead another remedy. If the libellant determined to obtain relief from the substitute which is provided for his common law remedy, and received compensation under such act, then he can not proceed in admiralty and thus obtain double compensation for the injury of which he complains."

In *Stoll v. Pacific Steamship Co.*, 205 Fed. 169, the court said: "Congress having in no way legislated in the premises, at least so far as interstate commerce by water is concerned, the State has the right to enact laws incidentally affecting interstate commerce."

For further discussion of these principles see L. R. A. 1916A (note) 461-465, 10 N. C. C. A. (note) 688-699.

NOTE.—See further and compare with decisions of U. S. Supreme Court handed down after this book was in print and quoted in full in § 265, Post.

§ 55. Elective Acceptance of Compensation Acts.

New York passed the first compensation law in 1910. It was compulsory as to employers in certain hazardous industries. This law was held unconstitutional in the case of *Ives v. South Buffalo Ry. Co.* 201 N. Y. 271. The result has been that all subsequent acts passed by the various States give the employer the right to exercise some kind of an option where there is any possible constitutional objection to a compulsory act.

Acts compulsory on both employer and employee with certain limitations and exceptions are now in force in California, Maryland, New York, Ohio, Oklahoma, Washington and Wyoming.

The great majority of the acts are elective in some degree and the trend of legislation seems to be away from compulsory compensation acts. In twelve States election to operate under the act is presumed, both as to employer and employee, in the absence of notice to the contrary. These States are Colorado, Connecticut, Indiana, Iowa, Kansas, Louisiana, Minnesota, Nebraska, Nevada, New Jersey, Pennsylvania and Wisconsin.

In six States the employer must give written notice to the proper authorities of his intention to operate under the act, while the employee, under certain conditions, is presumed to have elected to accept the act in the absence of notice to the employer to the contrary. These States are Massachusetts, Michigan, Montana, Rhode Island, Texas and West Virginia.

In Illinois and Oregon acceptance of the act is presumed as to certain hazardous employments, but as to nonhazardous employments the employer must give written notice of his intention to accept. But in either case the employee is presumed to have accepted without notice to the contrary.

In Arizona the act is compulsory as to the employers affected by it, but the employee need not elect whether to accept the benefits of the act or to sue at law for damages until after the injury has been received. The same is true concerning the employee in New Hampshire, but the employer must elect in writing whether to be governed by the act or not.

In Kentucky both employer and employee must elect in writing to operate under the act. In New York there are two laws in effect, one passed in 1910 is elective by written agreement of the employer and employee, and the other passed in 1913 is compulsory in the hazardous employments enumerated.

§ 56. Employee Cannot Accept Where the Employer Rejects the Act.

It was held in Illinois in the case of Favro, Admr., v. Superior Coal Co. 188 Ill. App. 203, in a proceeding arising under the act of 1911, that, "Where an employer refuses to accept the provisions of the act of 1911 an employee has no option in the matter. It is only when the employer accepts its provisions that the employee may reject it and must give notice thereof. Employer and employee automatically accept the provisions of the act by not filing an election not to accept the act, and under the act the em-

ployee only has the right of election where the employer has elected to accept its provisions. It was unnecessary to aver that the employee either had or had not accepted it, since under the act the rejection of it by the employer precludes the employee from rejecting it." See also *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill 480, 5 N. C. C. A. 419.

§ 57. Incomplete Compliance With Act By Employer—Effect.

In the case of *Bernard v. Michigan United Traction Co.*, — Mich. —, 154 N. W. 565, the Traction Company, on Nov. 9, 1912, filed notice with the Accident Board of its intention to accept the terms of the Michigan Workmen's Compensation Act, and asked the board for the privilege of carrying its own risk as to payment of benefits. The board did not approve of the election until November 20, 1912, and after that date the notices required by the act were posted by the company. The employee Bernard, being in the service of the company at the time the election was made, had thirty days in which to reject the act, after which he was presumed to have accepted it. The accident to Bernard occurred on the 12th day of November, eight days before the action of the board approving of the election made by the company. This action was delayed by the failure of the company to furnish certain information desired by the board. In the meantime, while Bernard was in the hospital, on December 3d, 1912, he signed certain papers by which he made application for his pay under the act. He claimed he did not know the legal effect of these papers and the company claimed this was an election. The court held to the contrary and held further that an employer cannot bring itself within the act until its notice of election to carry its own risk has been approved by the board; and, an accident occurring before the employer comes under the act, by the means provided, will not become subject to the act merely because the employee made statements or accepted compensation after the employer was in fact regularly under the act. Bernard was

allowed to sue at law for his injuries. See also *Shevchenko v. Detroit United Ry.* — Mich. —, 155 N. W. 423.

§ 58. Election by Employee Within Thirty Days After Passage of Act.

In the case of *Green v. Appleton Woolen Mills* 162, Wis. 145, 155 N. W. 958, the court said: "On October 2, 1911, the defendant elected to come under the provisions of the Workmen's Compensation Act. The accident happened on the day following. The plaintiff had not exercised his right of election. It is obvious that the act did not apply to him because his contract of employment was made before the employer became subject to the terms of the act, and the thirty days within which he might make an election under subdivision 2 of section 2394-8 had not expired when he was injured."

§ 59. Election By Employee Thirty Days Prior to Accident.

In the case of *Harris v. Hobart Iron Co.*, 127 Minn. 399, 149 N. W. 662, the court, construing the Minnesota act, said: "The act was approved April 24, 1913, to be in effect on October 1, 1913. Section 11 of the act provides, among other things, that every employer and employee is presumed to have accepted the act unless thirty days prior to the accident he elects not to accept its provisions and signifies his election by giving a notice in a manner specifically prescribed. . . . After the plaintiff served and filed his election not to accept—that is, on October 29, 1913—he was not subject to the provisions of the compensation act. Prior to that time he was. He was injured while subject to the act."

§ 60. A Notice to Accept or Reject the Act Effective Until Withdrawn.

In the case of *Bateman, Admx., v. Carterville & Big Muddy Coal Co.* 188 Ill. App. 357, it was held under the Illinois Act, that when an employer rejects the act his election to do so remains in force until withdrawn. See also *Synkus v. Big Muddy Coal & Iron Co.* 190 Ill. App. 602.



§ 61. Election of Acts of Two Different States.

This situation arises in the case of *Johnson v. Nelson*, 150 N. W. 620, 128 Minn. 158. Frank A. Johnson brought action against Peter Nelson for damages for injuries alleged to have been suffered by reason of the negligence of Nelson, the employer. These injuries were received on June 30, 1915, while Johnson was at work for Nelson in Wisconsin on railroad construction. Nelson's answer alleged that the case was governed by the Wisconsin Workmen's Compensation Act, and that the plaintiff Johnson could not therefore recover in this suit. Judgment was rendered in Nelson's favor in the district court of Hennepin county, and the plaintiff appealed.

The employee had been engaged in the same kind of work for the same employer in Minnesota for some time, and there was no definite contract as to the duration of the employment. Eighteen days before the injury he had been sent into Wisconsin to work. The employer had elected to come under the Wisconsin Act as far as his work in that State was concerned, but the employee claimed to know nothing of that statute.

The act provides that the employee in such case shall be subject to its provisions if he gives no notice at the time of entering the employment of his election not to be so subject. The court concluded that the plaintiff, by his failure to give notice, had accepted the provisions of the Wisconsin Act, and that his sole remedy was under it. The judgment of the court below was therefore affirmed.

§ 62. Common Law Defenses Not Available to Non-Electing Employer.

In practically every State or Territory having an elective act, the penalty upon the employer for rejection, is the loss of the right to set up the common law defenses of fellow servant, contributory negligence and assumption of the risk in an action at law for damages by an injured employee.

In *Wheeler v. Contoocook Mills Corp.* 77 N. H. 551, 94 Atl. 265, the Supreme Court of New Hampshire, following the universal rule, said:

"Another objection made to the constitutionality of the law is based upon the taking away of certain defenses and alleged discriminations and inequalities in the provisions made for regaining the same by accepting the provisions of the act. It was within the legislative power to abolish entirely the defenses of contributory negligence, assumption of risk and the fellow servant rule."

While ordinarily the doctrine of assumed risk cannot be invoked by a nonelecting employer in a suit for damages against him by an employee, it was held in Massachusetts that this provision of the Workman's Compensation Law did not take away the employer's defense of contractual assumption of risk. In *Ashton v. Boston & Maine R. R.* 222 Mass. 65, 109 N. E. 820, L. R. A. 1916 B, 1281, 12 N. C. C. A. 837, the court said: "The doctrine of contractual assumption of risk, that is, that the risk has one of the dangers incident to the employment, is not an affirmative defense, but stands upon an entirely different footing. With reference to risks and dangers covered by the contract, the employer owes the employee no duty and so cannot be held guilty of negligence. *Murch v. Thomas Wilson's Sons & Co.*, 168 Mass. 408; *Gleason v. Smith*, 172 Mass. 50. As the contractual assumption of risk is not a matter of affirmative defense and can be shown under a general denial, it is not affected by that part of the Workmen's Compensation Act above referred to."

Negligence on the part of the servant and assumed risk was no bar to recovery when the master has failed to accept the Ohio Act. *Crucible Steel Forge Co. v. Moir*, 219 F. 151, 135 C. C. A. 49. See also *Price v. Cloverleaf Coal Mining Co.* 188 Ill. App. 27, and *Lydman v. De Haas*, 185 Mich. 128, 151 N. W. 718, 8 N. C. C. A. 649.

Under the Wisconsin Act an employer who elects the act can rely on the defense of assumed risk, fellow servant

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and contributory negligence as against an employee who rejects the act. *Karny v. N. W. Malleable Iron Co.*, 160 Wis. 316, 151 N. W. 786.

Under the Ohio Act an employer who has five or more workmen and who rejects the act, loses his common law defenses. It was held that this does not acknowledge the basis of recovery on the ground of negligence beyond what it existed at common law, and the employer is only required to exercise ordinary care under all of the circumstances of the case. *Gerthung v. Stambaugh-Thompson Co.*, 1 Ohio App. 176, 34 O. Cir. Ctr. 385.

Where an employer, subject to the Mass. Act, rejected it and was sued for personal injury at common law, the only question was whether or not the employer was guilty of negligence. *Pope v. Heywood Bros. & Wakefield*, 221 Mass. 143, 108 N. E. 1058.

It was held in Illinois that the legislature had the right to abolish the common law defenses, inasmuch as they were established by the courts and not by the Constitution. *Strom v. Postal Telegraph-Cable Co.*, 271 Ill. 514, 111 N. E. 555.

In Iowa the common law defenses are removed from an employer who rejects the act, but it was held that the act could not be construed to create absolute liability for injuries to an employee when the employer was entirely free from blame. *Hunter v. Colfax Consol. Coal Co.*, 154 N. W. 1037—amended 157 N. W. 145, 11 N. C. C. A. 886.

Contractual assumption of risk was held not to be affected by the Mass. Act. *Ashton v. Boston & M. R. Co.*, 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B 1281.

The fact that the West Virginia Act denies the benefit of common law defenses to employers covered by the act, but not electing it, does not make it unconstitutional. *De Francesco v. Pinney Mining Co.*, 86 S. E. 777 (West Va.), 10 N. C. C. A. 1015.

The common law defenses are not constitutional guarantees, but merely rules of law which the legislature can

abolish in any manner they see fit. *Hawkins v. Bleakley*, 220 Fed. 378; *Hotel Bond Co.s Appeal*, 89 Conn. 143, 93 Atl. 245; *Havis v. Cudahy Ref. Co.*, 95 Kan. 505, 148 Pac. 626; *Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265; *Sexton v. Newark Dist. Teleg. Co.*, 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, 1 N. C. C. A. 517; *Opinion of the Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Mathison v. Minneapolis Street R. Co.*, 126 Minn. 286, 148 N. W. 71, 5 N. C. C. A. 871; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489, 3 N. C. C. A. 649; *State Ex rel Yapel v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, 1 N. C. C. A. 30; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648.

§ 63. Abrogation of Common Law Defenses Does Not Violate "Due Process of Law" Amendment.

In *Second Employers' Liability Cases*, 223 U. S. 1, on page 50, 32 Sup. Ct. 169, on page 175, Mr. Justice Van Devanter, speaking for the court, said: "Of the objection to these changes it is enough to observe: First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law can not be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.'"

§ 64. Allowing Defenses to Certain Employers While Denying Them to Others Not Unconstitutional.

In *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 Law Ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, the action was based on provisions of the Workmen's Compensation Act of Ohio, the question being raised as to the constitutionality



of a provision abrogating the defenses of certain employers. This act (sections 1465-37 to 1465-108, G. C.), in its original form, established an elective compensation system with an insurance fund to be maintained by premium payments by employers accepting its provisions. Employers of five or more persons failing to accept the provisions of the act were deprived of the defenses of fellow servant, contributory negligence and assumption of risks. Under an amended Constitution the law in its present form is compulsory, but the case in hand arose under the elective act. The defendant company, plaintiff in error in the present instance, was sued by Harry O. Blagg to recover damages for injuries received by him while in its employment, and, not having accepted the provisions of the act, it was deprived of the defenses named. Blagg recovered a judgment in the court of common pleas of Franklin county, Ohio, which judgment was affirmed in the court of appeals and the Supreme Court of the State. The case was then brought on a writ of error to the Supreme Court of the United States on the question of constitutionality, and specifically as to the validity of the provision distinguishing between employers of five or more workmen and those employing less than five persons. The Supreme Court, speaking by Mr. Justice Day, sustained the law as constitutional in an opinion which, following the statement of facts, reads mainly as follows:

“The fact that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones, is conceded in argument, and, is, we think, so obvious, that the State legislature can not be deemed guilty of arbitrary classification in making one rule for large and another for small establishments as to these defenses.

The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns

which employ less than five. Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employee in a shop with five employees with those having less. No employee is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employees by themselves considered, can not be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. (Cases cited.) . . .

This court has many times affirmed the general proposition that it is not the purpose of the fourteenth amendment in the equal protection clause to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. . . .

Certainly in the present case there has been no attempt at unjust and discriminatory regulations. The legislature was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employees. It included, as we have said, all of that class of institutions in the State. . . .

This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen and unavailable to employers with five and more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of

certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the same conditions as those on the other side of it, but if the State has the right to pass police regulations based upon such differences—and this court has held that it has—we must look to general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours.

We are not prepared to say that this act of the legislature, in bringing within its terms all establishments having five or more employees, including the deprivation of the defense of contributory negligence where such establishments neglect to take the benefit of the law, and leaving the employers of less than five out of the act was classification of that arbitrary and unreasonable nature which justifies a court in declaring this legislation unconstitutional.

It follows that the judgment of the Supreme Court of the State of Ohio is affirmed."

§ 65. Common Law Actions Abolished. Remedy of Acts Exclusive.

In *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915D 154, 4 N. C. C. A. 786, L. R. A. 1916A 358, the facts were as follows: Peet sued E. M. Mills, president of the Seattle R. & S. Ry. Co. for injuries received in January, 1912, while in the employment of the company as a motor-man. The compensation act of 1911 abolished the common law system, and all civil actions and civil causes of action against employers for personal injuries of employees. Conceding that he had no action against the company, Peet maintained that he had a right of action against the president, Mills, on account of his person failure to maintain a block signal system which had at one time been in use, but

was not in operation at the time the injury was received. It was contended that as the act was in derogation of the common law, it should be strictly construed as having no effect as against others than employers, and further that the title of the act was not broad enough to include the abrogation of the doctrine of negligence as against anyone except employers. Both points were rejected by the supreme court on grounds which appear in the following quotation from its opinion as delivered by Judge Morris.

“To say with appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principle the economic thought sought to be crystallized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens. The employer and employee as distinctive producing causes are lost sight of in the greater vision, that the industry itself is the great producing cause, and that the cost of an injury suffered in any industry is just as much a part of the cost of production as the tools, machinery, or material that enter into that production, recognizing no distinction between the injury and destruction of machinery and the injury and destruction of men in so far as each is a proper charge against the cost of production. The legislature in this act was dealing, not so much with causes of action and remedies, as with this great economic principle that has obtained recognition in these later years, and it sought in the use of language it deemed apt to embody this principle into law. That in so doing the legislative mind was intent upon the abolishment of all causes of action that may have heretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of section 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensa-

tion, and 'such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.'

Upon the second point we think there is no room for argument. The first clause of the title indicates that it is an act relating to the compensation of injured workmen in any industry of the State, and the employment of the language further on in the title, 'abolishing the doctrine of negligence as a ground for recovery of damages against employers,' is indicative of the evil the act seeks to overcome rather than the new remedy created. The title is plainly broad enough to indicate that the act is intended to furnish the only compensation to be allowed workmen subsequent to its becoming law, and as such clearly includes any and all rights of action theretofore existing in which such compensation might have been obtained."

The case of *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247, also illustrates this point: E. F. McRoberts was injured while in the employment of the company named and sought to recover in an action, claiming both benefits under the compensation act and damages at common law. Under the compensation act of the State election to accept its provisions is presumed in the absence of an affirmative rejection, which action had not been taken, so that both parties were within its provisions. The company demurred to the declaration, contending that McRoberts was not entitled to claim on both bases, but must elect the ground of his procedure. The district court of Wyandotte county overruled the objections of the company and the case proceeded to trial on the question of damages at common law, the court saying that the claim under the compensation law would be taken under advisement for future action. The result of the trial was a verdict for the plaintiff in the full amount claimed, whereupon the company appealed, insisting that the remedy provided by the compensation law is exclusive where it applies. This contention was sustained by the supreme court, citing its decision in *Shade v. Cement Co.*, 92 Kan. 146, 139 Pac. 1193. The decision in the case cited had not been announced when

the present case was tried nor when the appeal was taken, but it was conceded at the present time that the case should be settled under the compensation law in accordance with the ruling in the Shade case. The question was therefore submitted as to whether, under the record as presented, the judgment of the court below might be treated as an award of compensation. The court held that this was impossible, since to do so would be for it to try and determine an issue that was not considered nor decided by the trial court. Judge Johnston, speaking for the court, said:

"The elements which enter into a recovery of compensation differ radically from those which warrant a recovery of damages, and the evidence which would support the issue in one is inappropriate to offer in support of the other. Compensation for partial or total disability depends mainly on the average earnings of the injured employee for certain periods preceding the injury, while the damages awarded were not measured by earnings, but were based on the loss which resulted from pain and suffering endured by appellee and to be endured in the future, as well as the loss sustained by the disfigurement of his hand. The extent of the incapacity resulting from the injury is an important question for determination. Is the disability total or partial, and, if partial, is it of a permanent nature? The age of the employee is a consideration, as well as the grade of employment in which he had been engaged for the year preceding the accident, and, in determining what is a just average of the earnings of the employee, it is important to know whether his employment had been casual or continuous, and whether he had been engaged by more than one employer. No issue was formed on the matter of earnings, and the attention of the jury was not called to the evidence relating to wages and the award which the jury made was not based on an average of earnings. On the contrary, as we have seen, the jury were instructed to measure the recovery by the pain and suffering which appellee had endured before the trial and would probably undergo in the

future—a measure wholly inconsistent with that prescribed in the compensation statute. Maximum and minimum limitations are placed on the average of the earnings of an employee, and there is also a provision that payments for total and partial disability shall in no case extend over a period of eight years. Here, as we have seen, no consideration was given to any limitation, and the jury were authorized to award damages that appellee might sustain throughout his life by reason of the injury. If compensation is to be contested, an issue should be framed between the parties as to the right to compensation, each having an opportunity to offer testimony in support of the issue, and the compensation should be measured as the statute provides. There is no basis on which this court can treat the verdict as an award of compensation, nor is it warranted in directing a judgment for any amount on the record, as it stands.”

The judgment was therefore reversed and the case remanded for a new trial under the compensation act.

§ 66. Election of Acts By Minors.

In a number of States minors are made *sui juris* for the purpose of electing the acts, provided they are of legal working age. This is true in California, Colorado, Illinois, Maryland, Michigan, Minnesota, Nebraska, Kentucky, Ohio, Oregon, Rhode Island, Washington, Wisconsin and Wyoming.

In Connecticut the minor can elect if he has no parent or guardian. In Indiana and Vermont the parent or guardian must elect for him. In Louisiana a minor, 18 years old, can elect, but under that age the guardian must elect for him. In Maine the minor can elect and also the parent or guardian, and the minor is bound by their election. In New Jersey or Pennsylvania an election to reject the act can only be made by the parent or guardian. In many of the States no reference is made to minors who are included under the general term employees. For note on applicability of acts to minor workmen see 6 N. C. C. A. 763-774.

§ 67. Minors Made Sui Juris.

In most of the compensation States minors are made sui juris for the purpose of electing the acts, either specifically or by direct inference.

This term is defined in 27 Am. & Eng. Ency., 366, as follows: "A person who can validly contract and bind himself by a legal obligation, uncontrolled by any other person, is said to be sui juris; in other words, one subject to no incapacity such as nonage, coveture, or insanity is said to be sui juris."

The legislature has the power to declare a minor of full age for the purpose of making contracts. *Dickens v. Carr*, 84 Mo. 658; *Herkey v. Agar Mfg. Co.*, 90 Misc. 457, 153 N. Y. Supp. 369.

The Kentucky Act makes minors legally employed sui juris. In *Green v. Caldwell*, 170 Ky. 571, 186 S. W. 648, the court said: "It is true that this legislation does make material changes in the law of parent and child, but a sufficient answer to all of the objections urged is that the legislature, in undertaking to fix the status of minors under this act, was not restrained by any constitutional provision. It had unquestioned power to make such changes in what may be called the business relations of parent and child as seemed to it advisable."

§ 68. Minors In Prohibited Employments.

Generally speaking the fact that a minor is unlawfully employed does not take him out of the coverage of the acts. But in Minnesota, New Jersey and Wisconsin the act does not apply where the minor is employed in violation of law. *Pettee v. Noyes* (Minn.), 157 N. W. 995; *Stetz v. F. Mayer Boot & Shoe Co.* (Wis.), 156 N. W. 971; *Hetzel v. Watson Piston Ring Co.* (N. J.), 98 Atl. 306. Of course, this does not affect the minor's action at law. But it was held in Wisconsin in the case of *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, 154 N. W. 369, 11 N. C. C. A. 599, that the contrary was true if the minor was of legal age to be em-

ployed, although injured in a prohibited employment. The facts were as follows:

Clarence Foth brought action for damages for injury to his left arm received while in the employ of the company named. The employee was a minor who was of such age as to be legally employed, but not on the hazardous work which he was doing when injured. He claimed that under these circumstances he was entitled to bring a liability action, while the employer argued that the remedy would be under the compensation law. The court took the latter view and reversed the judgment in the plaintiff's favor. The compensation statute includes as an employee every person in the service of another, etc., "including minors who are legally permitted to work under the laws of the State." The court said:

"We reach the conclusion that the legislative purpose was as above indicated, and the words '(who, for the purposes of section 2394-8, shall be considered the same and shall have the power of contracting as adult employees),' were added to render clear that, without prejudice to liability under the penal statutes, any minor who is legally permitted to work at all in a gainful occupation is to be regarded as being competent to contract, as regards subjecting himself to the provisions of the workmen's compensation law, as fully as an adult person."

For note on minor legally permitted to work, but not in particular work to which assigned see 11 N. C. C. A. 599-604.

§.69. Parents Right of Action for Loss of Services of Minor Electing the Act.

Some of the acts expressly exclude the parents' right of action for injuries to a minor accepting the act. Most of the others do so by making the remedy provided by the act exclusive. But in *King v. Viscoloid Co.*, 219 Mass 420, 106 N. E. 988, 7 N. C. C. A. 254, the contrary was held. The facts were: The mother of a minor son injured in the employ of the company named brought action under the common law for the loss of his services. It was agreed that,

even though the son had received full compensation under the law, she was entitled to recover unless this right of action was barred by the provisions of the workmen's compensation act. The court held that the minor did not and could not waive this independent right of the parent, nor had the act, either expressly or by implication, taken away this common law right, and ordered a judgment in her favor for the sum previously agreed upon as the proper one if the plaintiff was entitled to recover.

For note on parents' common law right of action as affected by acts, see 7 N. C. C. A. 254-260.

§ 70. Employer Can Not Set Up Infancy as Bar to Action for Compensation.

In *Hoey v. Superior Laundry Co.*, 85 N. J. Law 119, 88 Atl. 823, the company objected that the employee was a minor, and that since the statute was based on contracts, the minor was under such disability that her contracts were voidable and an agreement to be bound thereby was not constitutional. As to this point the court in its syllabus held:

"In an action by an employee to recover compensation for injuries received while in the course of employment, the defendant can not set up the infancy of the plaintiff as a bar to the action, infancy being a personal privilege which none but the infant can take advantage of, and a contract voidable by an infant binds a person of full age."

§ 71. Conclusiveness of Claim by Minor for Compensation.

In *Hoey v. Superior Laundry Co.*, 85 N. J. Law 119, 88 Atl. 823, the question was also raised as to whether or not the judgment in this case would be binding on an infant the same as if a suit at law to recover damages had been brought, and on this point the official syllabus reads as follows:

"The judgment, in an action brought by an infant, by his next friend, to recover compensation as an employee for injuries suffered in the course of employment, under

the statute prescribing the liability of an employer in such cases, binds the plaintiff to the extent of the questions involved, as effectively as in a suit for damages, generally, without reliance upon the compensatory features of the statute."

§ 72. Misrepresentation of Age by Minor to Obtain a Prohibited Employment Does Not Relieve Employer.

In *Sturges & Burn Manufacturing Co. v. Beauchamp*, United States Supreme Court (Dec. 1, 1913), 34 Supreme Court Reporter, page 60, Justice Hughes said:

"The Federal question presented is whether the statute, as construed by the State court, contravenes the fourteenth amendment. It can not be doubted that the State was entitled to prohibit the employment of persons of tender years in dangerous occupations. (Cases cited.) It is urged that the plaintiff in error was not permitted to defend upon the ground that it acted in good faith, relying upon the representation made by Beauchamp that he was over sixteen. It is said that, being over fourteen, he at least had attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the State, in securing the safety of the young, to prohibit such employment altogether, it could select means appropriate to make its prohibition effective, and could compel employers, at their peril, to ascertain whether those they employed were in fact under the age specified. The imposition of absolute requirements of this sort is a familiar exercise of the protective power of government. (Cases cited.) And where, as here, such legislation has reasonable relation to a purpose which the State was entitled to effect, it is not open to constitutional objection as a deprivation of liberty or property without due process of law. (Cases Cited.)

It is also contended that the statute denied to the plaintiff in error the equal protection of the laws, but the classification it established was clearly within the legislative power."

§ 73. Joint Voluntary Application for the Benefits of the Act.

It is not, of course, necessary for any one engaged in the excepted employments to change their status in any way because of the passage of a workmen's compensation law. If such an employer, however, desires to agree with certain of his employees to accept the act because their employment is hazardous, or for any other reason, such partial election does not affect his relation to other employees. *Keaney v. Tappan*, 217 Mass, 5, 104 N. E. 438, 4 N. C. C. A. 556.

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CHAPTER II

ACCIDENT, INJURY AND DISEASE

Section.

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98. Accident may be established by circumstantial evidence.

§ 74. Use of Words "Accident" and "Injury."

The acts of thirteen States use the word "injury" alone and do not use the words "accidental" or "by accident" in

connection with it. These States are California, Colorado, Connecticut, Iowa, Massachusetts, Michigan, Montana, New Hampshire, Ohio, Texas, Washington, West Virginia and Wyoming. All of the other States use the words "injury by accident" or "accidental injuries" or words which indicate that the injury must be of an accidental nature before it is covered by the act. The word "injury" used without limitation generally denotes a broader coverage than where there must be the element of accident accompanying the injury. For instance, an injury may arise both "out of" and "in the course of" an employment and still not be of an accidental nature. Thus lead poisoning, an occupational disease, was held to be an "injury" within the Massachusetts Act. *Johnson's case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843. But this would not be true under the New Jersey Act, which refers to "injuries by accident"; *Liondale Bleach Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929 4 N. C. C. A. 713.

The words "injury" or "injury by accident" are very closely allied to the phrase "arising out of and in the course of employment" which immediately follows them in the acts, almost without exception, Texas, Wyoming, West Virginia and Wisconsin being the exceptions, and even in those States a phrase of somewhat similar import is used. Nevertheless the word "accident" and "injury" have a meaning under workmen's compensation decisions independent of their relation to other words and phrases. The word "injury" where used alone includes all accidents, but the word "accident" does not include all injuries. Therefore what is said in this chapter concerning "accident" is applicable also where the word "injury" alone is used.

§ 75. Meaning of "Accident" Generally.

In 1 Corpus Juris 390, it is said: "'Accident' in its legal signification is difficult to define; it is not a technical legal term with a clearly defined meaning. . . . In its most commonly accepted meaning the word denotes an event that

The first of these is the fact that the United States is a young nation. It is only about 150 years old, and its history is therefore a history of rapid growth and change. The second is the fact that the United States is a large nation. It covers a vast area of land, and its population is one of the largest in the world. The third is the fact that the United States is a diverse nation. It is made up of many different peoples, languages, and customs, and this diversity has been one of its strengths.

The fourth is the fact that the United States is a nation of immigrants. Most of the people who live in the United States today are the descendants of immigrants from other countries. This has given the United States a unique character, and it has been one of the reasons for its success. The fifth is the fact that the United States is a nation of ideas. It has been a place where new ideas have often been born, and it has been one of the reasons for its leadership in the world.

The sixth is the fact that the United States is a nation of freedom. It has been a place where people have often fought for their rights, and it has been one of the reasons for its success. The seventh is the fact that the United States is a nation of progress. It has been a place where new technologies have often been developed, and it has been one of the reasons for its leadership in the world.

The eighth is the fact that the United States is a nation of hope. It has been a place where people have often dreamed of a better future, and it has been one of the reasons for its success. The ninth is the fact that the United States is a nation of love. It has been a place where people have often shown kindness and compassion to one another, and it has been one of the reasons for its success.

The tenth is the fact that the United States is a nation of peace. It has been a place where people have often sought to resolve their differences peacefully, and it has been one of the reasons for its success. The eleventh is the fact that the United States is a nation of justice. It has been a place where people have often fought for what is right, and it has been one of the reasons for its success.

The first of these is the fact that the United States is a young nation, and that its history is a history of growth and development. The second is the fact that the United States is a nation of immigrants, and that its history is a history of the struggle for the rights of these immigrants. The third is the fact that the United States is a nation of free men, and that its history is a history of the struggle for the rights of these free men. The fourth is the fact that the United States is a nation of law, and that its history is a history of the struggle for the rights of these laws. The fifth is the fact that the United States is a nation of peace, and that its history is a history of the struggle for the rights of these peace.

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takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore is not expected; chance, casualty, contingency, an event happening without any human agency, or, if happening through a human agency, an event which, under the circumstances, is unusual and unexpected by the person to whom it happens; . . . something unexpectedly taking place, not according to the usual course of things; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; something happening by chance, a mishap. It has been said that the opposite of 'accident' is 'design,' 'volition,' 'intent,' and that in many of the definitions the idea of design is excluded, making the event wholly involuntary."

§ 76. Meaning of "Accident" Within the Acts.

The word "accident" is used in compensation acts in its popular sense. *Boody v. K. & C. Mfg. Co.*, 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A 10, Ann. Cas. 1914D 1280; *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A 273, 10 N. C. C. A. 729.

In *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585, the New Jersey Supreme Court said: "Within the purview of the act, an 'accident' is an unlooked-for mishap or untoward event which is not expected or designed."

An exhaustive discussion of the English and American cases, construing the word "accident", is found in L. R. A. 1916A, 29 and 227.

§ 77. Meaning of "Injury" Within Acts.

As stated before, when the act uses the words "personal injury" and does not use the word "accident" in connection with them, the meaning of the word "injury" is very broad and is susceptible of the construction that occupational diseases, although having no elements of accident in the popular sense, are within the scope of the act. The Massachusetts Act uses the words "personal injury" in this way. In

Johnson's case, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843, the court in holding that lead poisoning was a personal injury, said: "Under the act 'personal injury' is not limited to injuries caused by external violence, physical force, or as a result of the accident in the sense in which that word is commonly used and understood, but under the statute is to be given a much broader and more liberal meaning, and includes any bodily injury."

§ 78. Injury Accidental, Though Caused By Negligence.

In the case of Frieda Vennen, Admr., etc., v. New Dells Lumber Co., 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, 10 N. C. C. A. 729, the court said: "The contention that an injury resulting from carelessness or negligence is not one that can be said to have been accidentally sustained in the sense of the compensation act is not well founded. As declared in *Northwestern Iron Company v. Industrial Commission*, 154 Wis. 97, *post*, 366, 142 N. W. 271, Ann. Cas. 1915B, 877: 'In giving construction to such statutes words are to be taken and construed in the sense in which they are understood in common language, taking into consideration the text and subject matter relative to which they are employed.' The words should be given, as intended by the law-makers, their popular meaning. *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443, 146 N. W. 770. 'A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured which contributes to produce them. . . . Yet such injuries having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so.' Accidents without negligence are rare as compared to accidents resulting from negligence. Opinion of Paine, J., in *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174. The intention of the legislature to include accidental injuries resulting from negligence within the language of the compensation act is so manifest that there is no room to indulge in construction of the language employed. In the popular sense the words as used in the

compensation act, referring to a personal injury accidentally sustained by an employee while performing services growing out of and incidental to his employment, include all accidental injuries, whether happening through negligence or otherwise, except those intentionally self-inflicted. . . . The term 'accidental' as used in compensation laws, denotes something unusual, unexpected, undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes, or it may be due to oversight and negligence."

§ 79. Accident Must Occur At a Definite Time—Occupational Diseases Not Accidents.

In *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713, the facts were as follows:

Judgment was rendered for the employee, Riker, in the court of common pleas of Morris county, under the work men's compensation act. This was reversed on appeal, and a new trial granted by the supreme court. Riker had worked in the bleachery of the defendant company ten days when he was affected with a rash, pronounced to be a condition of eczema, which might have resulted from the acids used in the bleachery.

In rendering the decision, Judge Swayze, who delivered the opinion, reviewed the most important English cases bearing on the point as to whether this state of facts constituted an "accident" under the statute, and concluded as follows:

"We need not, of course, consider cases where there has been an accident and disease has followed. We have considered that question in *Newcomb v. Albertson*, 89 Atl. 928.

The English courts seem at last to have settled that, where no specific time or occasion can be fixed upon as the

time when the alleged accident happened, there is no 'injury by accident' within the meaning of the act. This seems a sensible working rule, especially in view of the provisions of the statute requiring notice in certain cases within fourteen days of the occurrence of the injury—a provision which must point to a specific time.

We need not consider in this case the question of the effect of a finding by the trial judge as in *Brintons, Limited, v. Turvey* (an English case in which a wool comber was infected by anthrax). Not only is there no such finding of fact, but the learned trial judge rested upon a construction of the statute which makes the word 'accident' include 'those events which were not only the result of violence and casualty, but also those resulting conditions, which were attributable to and caused by events that take place without one's foresight or expectation.' This, however, is to make the employer's liability turn on resulting conditions rather than on the fact of injury by accident. There may, indeed, be compensation awarded for resulting conditions where you can put your finger on the accident from which they result; but the ground of the action fixed by the statute is the injury by accident, not the results of an indefinite something which may not be an accident."

§ 80. Meaning of Phrase "Where Injury Is Proximally Caused By Accident."

In *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247, the court said:

"Proximate cause as applied to negligence law has, by definition, included within it the element of reasonable anticipation. Such element is a characteristic of negligence, not of physical causation. As long as it was necessary to a recovery to have a negligent act stand as the cause of an injury, it did no harm to characterize causation in part, at least, in terms of negligence. But when, as under the compensation act, no act of negligence is required in order to recover, the element of negligence, namely, reasonable antic-

ipation, contained in the term 'proximate cause,' must be eliminated therefrom, and the phrase 'where the injury is proximately caused by accident,' used in the statute, must be held to mean caused in a physical sense, by a chain of causation, which, both as to time, place and effect, is so closely related to the accident that the injury can be said to be proximately caused thereby. To incorporate into the phrase 'proximately caused by accident' all the conceptions of proximate cause in the law of negligence would be to lug in at one door what the legislature industriously put out at another. Proximate cause, under the law of negligence, always has to be tracked back to the conduct of a responsible human agency; under the compensation act the words 'Proximately caused by accident' in terms relate to a physical fact only; namely, an accident. Hence if the injury or death can be traced by physical causation not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation."

In *Great Western Power Co. v. Pillsbury* 171, Cal. 79, 151 Pac. 1136, L. R. A. 1916A 281, 11 N. C. C. A. 493, the facts were as follows: On July 1, 1914, Ernest Dreyer was in the employ of the company named, shaving and painting poles. He accidentally caught his left hand between a pole and another piece of timber, bruising the flesh and knocking a small piece of skin from the back of the hand. He continued at work on July 2 and 3, using the other hand only. July 4 was Saturday, and when work was resumed on Monday he was unable to go to work because of the condition of the hand and the severe pain. Blood poisoning appeared to be the cause of the condition, and the time when the pain and suppuration ensued was said by physicians to be consistent with the period of development of a common germ causing this condition, if the bacilli had entered at or about the time of the accident. An award of \$78.97 was made, with the further sum of \$9.37 weekly, beginning September 17, 1914, and continuing until the termination of the dis-

ability. This award was affirmed, Judge Shaw saying in the opinion:

"We perceive no merit in the claim that this disability was not proximately caused by the injury and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces; that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances with which any person may come in contact, and which are invisible to the eye and imperceptible to the senses. The accident was the proximate cause of the injury, within the definition of the term 'proximate cause' as elaborately stated by Justice Henshaw in *Merrill v. Los Angeles, etc., Co.* (158 Cal. 503, 111 Pac. 534)."

In *Kill v. Industrial Commission of Wisconsin et al.*, 160 Wis. 549, 152 N. W. 148, L. R. A. 1916A 14, Edward A. Kill cut his left wrist on April 16, 1915, while in the employ of the Plankinton Packing Co. as a tinsmith. The company sent him to a physician, who treated him, and on April 25 the wound was practically healed. On the evening of April 26 the injured man engaged in a boxing bout, and the wrist afterwards grew worse and became infected, finally resulting in the loss of bones of the hand and wrist, incapacitating him from following his trade. The commission found that the bacteria had been walled off by natural processes at the time he engaged in the boxing match, and would not have done further harm, and eventually would have been expelled from the system but for the strenuous exercise which stirred them to renewed activity and at the same time lessened his resisting power. The commission on these findings dismissed the application for compensation, and the circuit court of Dane county entered judgment confirming this order. The supreme court affirmed the judgment, holding that the injury was not the proximate cause of the ultimate disability. Judge Kerwin, in delivering the opinion, said in part:

"In the instant case, the bout which was subsequent to

the original injury, intervened and was the efficient cause and had its origin independent of the original cause and superseded it and thereby became the proximate cause of the injury. (Cases cited.)

As appears from the statement of facts, the commission found that had the applicant refrained from entering the boxing bout, and given his wrist only moderate exercise for a few days more, no serious result would have followed. This finding is supported by the evidence, and establishes the fact that the boxing bout proximately caused the injury complained of, within the meaning of the workmen's compensation act; therefore the decision below is right and must be affirmed."

§ 81. Diseases As "Accidents" or "Injuries" In General.

Occupational diseases are not covered by the acts unless the act so states or unless the courts have construed them to be included in the phrase "personal injuries." As to other diseases they are usually held to be compensable only when there is a direct causal connection between the disease and the accident or injury, as the case may be. *Boyne v. Riverside Storage & Cartage Co.*, 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837. It is impossible to say that there is any general rule laid down by the cases as to when a disease is the result of accident or injury. The facts of each case must govern. Workmen's compensation acts were adopted in order to relieve the workmen from the loss from injuries which were a natural hazard of the business and which the business ought to bear. While much can be said in favor of covering occupational diseases by statute because they are a natural hazard of the business, that reasoning does not apply to other diseases unless they are clearly caused by a definite accident or injury.

An employee had a neurotic condition which might have been thrown off. It was held that this did not deprive him of the right to compensation under the Massachusetts Act. *In re Hunnewell* 220 Mass. 351, 107 N. E. 934.

Miliary tuberculosis, from which an employee died, was held to be approximately caused by a gas explosion while he was varnishing a drum in the employer's cellar, under the Wisconsin Act. *Heileman Brewing Co. v. Schultz*, 161 Wis. 46, 152 N. W. 446 .

As the result of an injury received in the course of his employment an employee developed paralysis, paresis and insanity. He was held to be entitled to compensation under the Mass. Act, although the diseases had been pre-existent, but up to the time of the injury had been latent and did not impair his ability to work. *Crowley v. City of Lowell*, 223 Mass. 288, 111 N. E. 786.

An employee was working on a crane when one of the timbers broke. He jumped into the river to save himself and the exposure which resulted caused pulmonary tuberculosis. It was held that he suffered an accidental injury in the course of employment. *Rist v. Larkin & Sangster*, 156 N. Y. Supp. 875, 171 App. Div. 71.

An employee who received an injury which culminated in septicaemia, died as a result of it, although the disease was partly caused by conditions antecedent to the injury. It was held that the New York Act applied. *Mazzarisi v. Ward & Tulley*, 156 N. Y. Supp. 964, 170 App. Div. 868.

Occupational diseases are not within the meaning of the Ohio Act. *Industrial Acc. Comm. v. Brown*, 110 N. E. 744, 92 Ohio State 309, L. R. A. 1916B 1277.

An attack of dizziness produced by disease was held to be an accident within the Rhode Island Act. *Carrol v. What Cheer Stables Co.*, 96 A. 208 (R. I.).

Paralysis was held to be due to an injury sustained in the employment in the case of *Frey v. Kerens-Donnewald Coal Co.*, 110 N. E. 824, 271 Ill. 121.

Where blood poisoning resulted from an abrasion of the skin, the court said in the case of *Great Western Power Co. v. Pillsbury et al.*, 171 Cal. 69, 151 Pac. 1136, L. R. A. 1916A 281, 11 N. C. C. A. 493: "We perceive no merit in the claim that this disability was not proximately caused by the injury

The first of these was the discovery of gold in California in 1848. This discovery led to a great influx of people to California, and the state became a great center of population. The second was the discovery of gold in Nevada in 1859. This discovery led to a great influx of people to Nevada, and the state became a great center of population. The third was the discovery of gold in Colorado in 1858. This discovery led to a great influx of people to Colorado, and the state became a great center of population.

The fourth was the discovery of gold in Idaho in 1860. This discovery led to a great influx of people to Idaho, and the state became a great center of population. The fifth was the discovery of gold in Montana in 1862. This discovery led to a great influx of people to Montana, and the state became a great center of population. The sixth was the discovery of gold in Wyoming in 1863. This discovery led to a great influx of people to Wyoming, and the state became a great center of population.

The seventh was the discovery of gold in Utah in 1864. This discovery led to a great influx of people to Utah, and the state became a great center of population. The eighth was the discovery of gold in Arizona in 1865. This discovery led to a great influx of people to Arizona, and the state became a great center of population. The ninth was the discovery of gold in New Mexico in 1866. This discovery led to a great influx of people to New Mexico, and the state became a great center of population.

The tenth was the discovery of gold in Texas in 1867. This discovery led to a great influx of people to Texas, and the state became a great center of population. The eleventh was the discovery of gold in Louisiana in 1868. This discovery led to a great influx of people to Louisiana, and the state became a great center of population. The twelfth was the discovery of gold in Mississippi in 1869. This discovery led to a great influx of people to Mississippi, and the state became a great center of population.

The thirteenth was the discovery of gold in Alabama in 1870. This discovery led to a great influx of people to Alabama, and the state became a great center of population. The fourteenth was the discovery of gold in Georgia in 1871. This discovery led to a great influx of people to Georgia, and the state became a great center of population.

The fifteenth was the discovery of gold in Florida in 1872. This discovery led to a great influx of people to Florida, and the state became a great center of population. The sixteenth was the discovery of gold in South Carolina in 1873. This discovery led to a great influx of people to South Carolina, and the state became a great center of population.

The seventeenth was the discovery of gold in North Carolina in 1874. This discovery led to a great influx of people to North Carolina, and the state became a great center of population. The eighteenth was the discovery of gold in Virginia in 1875. This discovery led to a great influx of people to Virginia, and the state became a great center of population.

The nineteenth was the discovery of gold in West Virginia in 1876. This discovery led to a great influx of people to West Virginia, and the state became a great center of population. The twentieth was the discovery of gold in Maryland in 1877. This discovery led to a great influx of people to Maryland, and the state became a great center of population.

The twenty-first was the discovery of gold in Delaware in 1878. This discovery led to a great influx of people to Delaware, and the state became a great center of population.

and abrasion of the skin. Such results do ensue from such abrasions, and they are brought about by the operation of what are ordinarily considered natural forces; that is, by the intervention of infectious germs usually, or at least frequently, present in the air or on the surface of substances with which any person may come in contact, and which are invisible to the eye and imperceptible to the senses."

Blood poisoning has been held compensable in the following cases: *Fleet v. Johnson*, 6 B. W. C. C. 60 (Eng.); *Burn's Case*, 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 635; *Thompson v. Ashington Coal Co.*, 17 Times L. R. 345 (Eng.). Of course, the accident from which the blood poisoning results must be shown to have been one to which the act is applicable. The following diseases following traumatic injury have been held subjects for compensation: *Erysipelas* after an injury to a workman's foot; *Mutter v. Thomson*, 50 Scot. L. R. 447, 6 B. W. C. C. 424. *Epilepsy* after a fractured skull; *Butt v. Gellyceidrim Colliery Co.*, 3 B. W. C. C. 344. *Appendicitis* and *peritonitis* after a severe shaking; *Enman v. Dalziel*, 50 Scot. L. R. 143, 6 B. W. C. C. 900. *Abscess* following a fracture and resulting in *ankylosis*; *Newcomb v. Albertson*, 85 N. J. L. 435, 89 Atl. 928, 4 N. C. C. A. 783. *Pneumonia* caused by hurt or strain of the back; *Boyne v. Riverside Storage & Cartage Co.*, 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837. *Tetanus*, or *lockjaw*, from stepping on a nail; *Walker v. Mullens*, 42 Ir. Law Times 168, 1 B. W. C. C. 211.

For exhaustive note on recovery of compensation for incapacity resulting from disease, see L. R. A. 1916A, 289-295.

For note on occupational diseases as personal injuries, see 8 N. C. C. A. 1089-1093, 6 N. C. C. A. 482-494, 4 N. C. C. A. 843-849.

For note on blood poisoning as accident, see 11 N. C. C. A. 493-511. For note on personal injury resulting from poisonous or deleterious matter as accident, see 10 N. C. C. A. 257-277.

§ 82. Traumatic Injury.

The Kentucky Act provides that no disease shall be covered by it unless it is the result of a traumatic injury by accident.

The Standard Dictionary defines "trauma" as "any injury to the body caused by violence; also the violence that causes it." Therefore any injury to the body caused by violence would be a "traumatic injury;" and any disease following such injury as a natural and direct result is within the purview of the act. In "Accidents in Their Medico-Legal Aspect," edited by Douglas Knocker (Eng.), 456, in an article on "Insanity Caused by Injury," Theodore B. Hyslop, M. D., says: "Nowadays it is recognized that after injuries (trauma) or shocks four classes of conditions may arise, viz.: 1. Actual structural or organic changes in the central nervous system. 2. Traumatic hysteria which is the consequence of injury. 3. Traumatic neurasthenia. 4. Traumatic psychoses, or morbid mental states." In the same work on page 168, Frederick E. Batten, M. D., says: "Inflammation of the coverings of the brain (meningitis), and abscess of the brain, or even epilepsy, may follow an injury to the brain. It is far more common for an injury to be followed only by functional disturbance of the nervous system than by actual disease."

§ 83. Disease Without Accident Not Compensable.

Under the English Act in *Eke v. Hart-Dyke*, 2 K. B. 677, 3 N. C. C. A. 230, it was claimed that a laborer died as a result of ptomaine poisoning from sewer gas, breathed while cleaning certain cesspools for his employer. It was said by the court that this was not an industrial disease such as is scheduled under the English Act, and for which compensation is payable by statute regardless of accident. Having in mind the above facts, the court said:

"Was there 'an injury by accident arising out of and in the course of the employment?' In my opinion there was not. This court and the House of Lords have been

engaged again and again in discussing the word 'accident', and, so far as I am aware, neither this court nor the House of Lords has ever attempted to say that a mere disease without accident, not attributed to something which may properly be called an accident, entitles a workman to compensation under the Act."

§ 84. Occupational Diseases As Injuries Within the Act— Michigan View.

In the case of *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A 282, 283, 6 N. C. C. A. 482, the court, in holding that disability due to lead poisoning was not within the coverage of the act, said:

"It seems to be established under the English cases that lead poisoning is not an accident. It is an occupational disease. It seems to follow from this that unless the Michigan Workmen's Compensation Law is broad enough to include and cover occupational diseases, the applicant's claim in this case must be denied. The controlling provision of the act on this point is found in article 1 of part 2, and is as follows: 'If an employee . . . receives a personal injury arising out of and in the course of his employment,' he shall be paid compensation, etc. It will be noted that the above language does not limit the right of compensation to such persons as receive personal injuries by accident. The language in this respect is broader than the English Act, and clearly includes all personal injuries arising out of and in the course of the employment, whether the same are caused 'by accident' or otherwise. . . . Manifestly, the terms 'personal injury' and 'personal injuries,' above mentioned, refer to common law conditions and liabilities, and do not refer to and include occupational diseases, because an employee had no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only accidents, or rather, accidental injuries, gave a right of action. We are not able to find a single case where an employee

has recovered compensation for an occupational disease at common law. Certainly it can be said that in this State no employer has ever been held liable to the employee for injury from an occupational disease, but only for injuries caused by negligence. It seems to us that the whole scheme of this act negatives any liability of the employer for injury resulting from an occupational disease."

**§ 85. Occupational Diseases As Injuries Within the Act.—
Massachusetts View.**

In *Johnson v. London Guaranty & Accident Company*, 217 Mass. 338, 104 N. E. 735, 4 N. C. C. A. 843, the court in holding that lead poisoning was a personal injury within the act, said:

"Under the act, 'personal injury' is not limited to injuries caused by external violence, physical force, or as the result of the accident in the sense in which that word is commonly used and understood, but under the statute is to be given a much broader and more liberal meaning, and includes any bodily injury. . . .

Aside from the decisions under the English Act which provides for compensation for 'personal injuries by accident,' it is clear that 'personal injury' under our act includes any injury or disease which arises out of and in the course of the employment, which causes incapacity for work and thereby impairs the ability of the employee for earning wages. The case of *Hood & Sons v. Maryland Casualty Co.*, 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.), 1192, 138 Am. St. Rep. 379, is decisive of the case at bar. In that case it was held that for a person to become infected with glanders was to suffer a bodily injury by accident."

§ 86. Heart Disease As An Accident Under the English Act.

The English Act refers to "injuries by accident." In the case of *McArdle v. Swansea Harbour Trust*, 8 B. W. C. C. 489, 11 N. C. C. A. 175, an employee was working regularly at work rather simple in its nature, but not easily

performed. It involved pulling boxes weighing on the average 200 pounds all day long. The court said:

“While the man was in the act of pulling a box forward in the manner which I have described, he suddenly fell down and died practically instantaneously. I never saw a case in which death was so clearly arising out of the employment in the sense of being physically connected with it, because he died in the very act of doing the work which he was employed to do, but, of course, that does not conclude the matter. It was found, on the post-mortem, on undisputed evidence, that the death was due to rupture of an aneurism. It also appears that this is a disease which does not generally, and in this particular case did not, arise suddenly; it was probably of long standing. The artery was in a bad condition, but, as always happens, the moment came when the walls of the artery broke, and the blood came out, and death followed almost immediately. Now what is the necessary result of those facts, all of which I think are beyond contest and beyond dispute? In the first place, it seems to me that, within the definition given by the House of Lords on more than one occasion, of an accident, this was clearly an accident, and I cannot bring myself to doubt that it was an accident within the meaning of Lord Macnaghten’s oft quoted and oft approved judgment in *Fenton v. Thorley & Co., Ltd.* (1903), A. C. 443; 5 W. C. C. 1, nor do I think there is any doubt that it was also an accident within the meaning of the judgment of the majority of the court in *Clover, Clayton & Co., Ltd., v. Hughes* (1910), A. C. 242; 3 B. W. C. C. 275. If it was an accident it is said that it still may not be an accident arising out of the employment. It may be that he was not doing anything at the time, or shortly before the time of death, which in any way could contribute to it or accelerate the fatal end. The artery must have been broken, the aneurism must have been ruptured, at some time, and in the natural course of events it would have been long distant. But we have, as it seems to

me, to deal with the rupture of the aneurism at the particular time at which it was ruptured."

Heart failure was held compensable in the following cases: In *re Fisher*, 220 Mass. 581, 11 N. C. C. A. (note) 177; *O'Hare v. Employers' Liability Assurance Corp'n.*, 2 Mass. Workm. Comp. Cas. 369, 11 N. C. C. A. 178; In *re Brightman*, 220 Mass. 17, 8 N. C. C. A. 102, *Winter v. Atkinson*, Frizelle Co., 37 N. J. L. J. 195, 11 N. C. C. A. 180; In *re Madden*, 222 Mass. 487, 111 N. E. 379. But compensation was denied in *Waldman v. Herman*, 1 Cal. Ind. Acc. Comm. 82, 11 N. C. C. A. 178; *Farrish v. Nugent*, 1 Cal. Ind. Acc. Comm. 98, 11 N. C. C. A. 179; In *re Stith*, Ohio Ind. Comm. No. 24574, 11 N. C. C. A. 180.

For note on death from heart disease under Workmen's Compensation Acts, see 11 N. C. C. A. 175-186, 8 N. C. C. A. 102-106, L. R. A. 1916A 33, 34.

§ 87. Injury Aggravating Pre-Existing Disease.

In *Walters v. Brune*, 2 Cal. Ind. Acc. Comm., Dec. (1915), 249, 10 N. C. C. A. (note) 759, it was said: "The employer takes his employee subject to the physical condition he is in at the time he enters employment.. Compensation is for the benefit of the subnormal except in exaggerated cases where, by reason of constitutional diseases or disorders, such as tuberculosis or syphilis, an injured workman suffers for a period far beyond what would be the case if he were in a condition of ordinary physical health." But when an employee receives an injury which would cause only a short disability, ordinarily, yet causes continuing disability by reason of a pre-existing disease, he is not entitled to compensation beyond that which would have been due to a normal employee for the same injury. *Johnson v. Lowe*, 2 Cal. Ind. Acc. Comm. Dec. 568.

There must be an unbroken chain of causation, between the accident or injury complained of and the disability, and unless the accident or injury was the proximate contributing cause of the disability compensation cannot be allowed. In *re Madden*, 220 Mass. 487, 111 N. E. 379.

The English rule is well stated in the case of *Clover v. Hughes*, 3 B. W. C. C. 275, when the court said that an employee is entitled to compensation, "if it appears that the employment is one of the contributing causes; without which the accident which actually happened would not have happened, and if the accident is one of the contributing causes, without which the injury which actually followed would not have followed."

For note on injury accelerating death from pre-existing disease or aggravating the condition of it, see 10 N. C. C. A. (note) 756-777.

The questions above discussed were treated in *Beare v. Garrod*, 8 B. W. C. C. 474, 10 N. C. C. A. 756 (Eng.), Lord Cozens-Hardy said:

"This is an appeal from a decision of his Honour, Judge Woodfall, who has held that the dependents of the deceased workman are entitled to compensation in respect of an admitted accident. The accident was caused by a runaway horse, the man being thrown off a van and seriously injured. He was taken to St. George's Hospital first and afterward to another hospital. The accident affected him mentally for some considerable time. He was sent away on October 14, from the hospital to the Croydon Infirmary, but instead of going to the infirmary he arrived unexpectedly at his house, where his wife was. He arrived home on October 14 and two days afterward, on October 16, he was found to be suffering from acute and active tuberculosis, from which he died on December 2. . . . It is not for me to say what conclusion I should have arrived at, having regard to this evidence, but I feel that I can not say that there was not evidence upon which the learned County Court Judge might have come to the conclusion which he came to, namely, that the death resulted from the accident. The word 'resulted,' of course, includes 'accelerated by,' and I do not mean 'result' in any other sense than that the death was accelerated by the accident. . . . That accident, of course, was a very serious one; it affected his

brain, it affected his vitality, and the medical evidence seems to me abundant to show that, as a medical problem, such lowering of vitality might cause the acceleration of death; that it might light up the tuberculosis and ultimately cause his death. I can not bring myself to say that there was not sufficient to justify the learned County Court Judge in coming to the conclusion that he did come to. I will read the passage in his judgment, which is this: 'The evidence has, in my opinion, established that the man before the accident had a fibrous condition of the lungs, which was quiescent, and did not prevent him from working and earning his living. That such a condition is not necessarily fatal nor incapacitating unless by reason of illness or other untoward cause, the power of resistance is lessened, in which case acute inflammatory symptoms of tuberculosis might be set up. That the injuries sustained, especially brain injury, might bring about this aggravation of the latent mischief, and an onset of acute and rapid tuberculosis. There is no evidence that he was ever discharged as cured of the cerebral injury, and, apart from the evidence of his statement to his wife, the evidence shows an unbroken chain of causation—injury incurred which might induce the cause of death—no evidence of other cause—and in a short time death from the potential cause.' Then he says: 'Rejecting the evidence of the alleged statement, I find the applicant has proved her case, and I make the award.' In my opinion, it is impossible to say there was no evidence which justified the learned County Court Judge in finding as he did, and there being no trace of a *novus actus interveniens*, and there being evidence that the accident did take place which would suffice to set up the condition, it is impossible for us to interfere or to allow this appeal to succeed."

§ 88. Internal Rupture As Accident.

This point is illustrated by the case of *Voorhees v. Smith, Schoonmaker Co.*, 86 N. J. Law 500, 92 Atl. 280, 7 N. C. C. A. 646. The court said:

"The principal question raised is whether the court of common pleas was justified in finding that the death of Ira Voorhees, the employee, resulted from an accident arising out of and in the course of his employment. The deceased, a man of middle age or over, worked in a woodworking shop of prosecutor, and at the time of the seizure just preceding his death was working at a task of furrowing 16 posts, each six inches square and weighing about 100 pounds apiece. To do this he had to get each post up on the table of the furrowing machine, and push it forward against the knives by body pressure, which was exerted by pushing his abdomen forcibly against the end of the post. Each post had to be run through twice. After Voorhees had finished 13 of the posts he sat down, evidently in great pain, and shortly afterward sent for a doctor, who had him taken home, where he died 3 days later. He vomited blood and passed bloody stools, and the doctor pronounced the trouble internal hemorrhage. After death the undertaker, as he testified, found the body in such condition that he had it buried a day earlier than originally intended. It was in evidence that there was a large bruise on the abdomen where the pressure had been exerted on the ends of the posts.

The effort of the defense was to show that death was produced by a rupture resulting from cancer. The family refused to consent to an autopsy, but that was their right. It must be conceded that much of the evidence points to cancer and an internal rupture of some kind. But it was quite plain, and the trial court was fully justified in finding, that the rupture occurred while the deceased was in the very act of doing some unusually heavy work. So that, even if deceased was suffering from internal cancer, it was quite within the province of the court to find that the proximate cause of death was the unusual and forcible pressure on parts weakened by disease, which but for the unusual strain would have held out for a considerable period."

§ 88. A Hernia As An Accident.

The general rule is that where a new hernia results directly from a strain or an over-exertion of some kind while the workman is performing the duties of his employment, it is a personal injury by accident within the meaning of Workmen's Compensation Acts. This is true even where the act does not specifically so provide. *Zappala v. Industrial Commission of the State of Washington*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295; *Poccardi, etc., v. Public Service Commission (W. Va.)*, 84 S. E. 242, L. R. A. 1916A, 299; *Voorhees v. Smith-Schoonmaker Co.*, 86 N. J. L. 500, 82 Atl. 280, 7 N. C. C. A. 646, *Andreini v. Cudahy Packing Co. et al.*, 1 Cal. Ind. Acc. Comm. Dec. 8, 6 N. C. C. A. 390, and may be true, although there was a previously existing structural weakness at the point where the injury was received, *Bell v. Haynes-Ionia Co. (Mich.)*, 158 N. W. 179; but an old well developed hernia which is likely to cause trouble at any time regardless of any special strain or accident is not within the scope of the acts. *Koras v. Northern Electric R. R. Co.*, 2 Cal. Ind. Acc. Comm. Dec. 196, *U. S. F. & G. Co. v. Rawling*, 1 Cal. Ind. Acc. Comm. Dec. 64. For further cases sustaining this rule and notes discussing the subject generally, see 6 N. C. C. A. (note) 390-405, L. R. A. 1916A (note) 303.

In *Poccardi v. Pub. Serv. Comm. (supra)*, West Va., in a headnote prepared by the court it is said: "A rupture caused by strain while at work is an accident or untoward event arising in the course of employment, and compensable under the Workmen's Compensation Act."

In *Knocker's Accidents in their Medico-Legal Aspect*, page 694, it is said, "a new hernia rarely if ever occurs from an accident," again on page 702, "all laborious occupations tend to gradually produce hernias. The heavy work long continued, especially with the patient holding the breath, raises the internal abdominal pressure which affects some weak spot in the abdominal wall and slowly and persistently stretches it, so that a hernia forms here by

degrees until it is large enough to attract the attention of the patient."

In Coley's Monograph on Hernia in Keen's Surgery, Vol. 4, p. 27, it is said: "Kaufman of Zurich has made a careful study of this question based upon medical jurisprudence. These are his conclusions: A hernia, in order to be entitled to any indemnity, must appear suddenly; must be accompanied by pain, and must immediately follow an accident; there must be proof that the hernia did not exist prior to the accident."

Provisions almost exactly similar to this statement have been made in the laws of Colorado, Montana and West Virginia. Kentucky's provision is similar except that the provision concerning pain was left out. The Washington Board has adopted rules similar to the above, as essentials to recovery for hernia and these rules have been upheld in *Zappala v. Industrial Comm.* 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295.

For further discussion of hernia under Workmen's Compensation Acts see L. R. A. 1916A 303, 6 N. C. C. A. 390-405.

§ 89. Typhoid Fever From Drinking Water Furnished By Employer, As Accident.

In *Vennen v. New Dells Lumber Co.* 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, 10 N. C. C. A. 729, the facts were that Frieda Vennen brought action as administratrix for the death of her husband, Gerhard Vennen, who had been an employee of the company named. The company maintained toilets for the use of its employees, the sewage from which was discharged into the river near its plant. It was alleged that the company took water from the river, in such location that it was contaminated by the sewage, as well as from the city waterworks, for use in the plant; that through improper connections the two supplies became commingled; that the company caused its employees to drink of this water; and that as a result Vennen became sick with typhoid fever and died. The company's answer

set forth facts which, with the allegations of the declaration, it claimed brought the plaintiff's remedy under the workmen's compensation act. The plaintiff demurred to the answer, the demurrer was overruled, and the plaintiff appealed. The court affirmed the decision below, thus holding that the facts as alleged brought the matter within the scope of the compensation act, and that the proceeding must be as provided by it. Judge Siebecker, who delivered the opinion, said in part:

"The facts alleged show that the parties to the action were subject to the compensation act. The inquiry then is: Was Vennen's death proximately caused by accident while he was 'performing services growing out of and incidental to his employment'? The inference from the alleged facts is reasonably clear that Vennen at the time of the alleged injury resulting in his death was 'performing services growing out of and incidental to his employment.'

The contention that an injury resulting from carelessness or negligence is not one that can be said to have been accidentally sustained in the sense of the compensation act is not well founded.

The fact that the deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury, but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfill the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence, while he was 'performing services growing out of and incidental to his employment.' It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid

disease, which caused his death. Diseases caused by accident to employees while 'performing services growing out of and incidental to his employment' are injuries within the contemplation of the workmen's compensation act. This was recognized in the case of Heileman Brewing Co. v. Industrial Commission, 152 N. W. 446 [evidence that inhalation of gas fumes following explosion excited latent infection, or lowered vitality so as to increase liability to infection, death resulting from miliary tuberculosis], and Voelz v. Industrial Commission, 152 N. W. 830. [Here English cases are examined.] We are of the opinion that the decision of the trial court holding that the facts pleaded show that Vennen's death was caused by accident while performing service growing out of and incidental to his employment is correct, and that the demurrer was properly overruled."

For note on illness caused by beverage furnished by employer see 10 N. C. C. A. 729-742.

§ 90. Ivy Poisoning As An Accident.

In Plass v. Central New Eng. R. Co. 169 App. Div. 826, 155 N. Y. Supp. 854, Jane Plass proceeded under the workmen's compensation law for compensation for the death of her husband, a section laborer of the company named. He came in contact with poison ivy while mowing the right of way of the railroad, and the poisoning resulted successively in blood poisoning, bronchitis and congestion of the lungs, from which he died. The company appealed from an award made by the compensation commission, but it was affirmed, Judge Kellogg, speaking for the court, saying:

"It has been held that contact with poison ivy which results in death is an accidental death within a policy covering death by external, violent, and accidental means. (Railway Association v. Dent, 213 Fed. 981.) The injury can not be called an occupational disease. Plass actually, inadvertently, came in physical contact with poison ivy. The poison to his system caused thereby resulted in his sickness, and reduced his power of resistance, and made him sus-

ceptible to bronchitis. The attending physician treated him for ivy poisoning, and then found he had developed more or less infection, the blebs breaking open, and in that way he became infected, and while in bed contracted bronchitis, which afterwards developed œdema of the lungs, and he died quite suddenly.

The commission has found that the ivy and septic poisoning was the remote cause of his death, and that his poisoned condition predisposed him to the acute congestion of the lungs of which he died. We are not at liberty to review the findings of commission upon a question of fact. There is certainly some evidence to warrant the finding."

§ 91. Nervous Shock As An Accident.

Nervous conditions brought on by an accident or a catastrophe are usually held both in England and the United States, to be covered by the acts so that disability resulting therefrom is compensable.

In *Yates v. South Kirkby, F. & H. Collieries Ltd.* 2 K. B. 538, 3 N. C. C. A. 225, 79 L. J. K. B. 809, Cozens-Hardy M. R. said: "I think the discisions of this court, including the recent decisions in the case of *Eaves v. Blaenclydach Colliery Co. Ltd.* 2 K. B. 73, do show that when a man in the course of his employment sustains a nervous shock producing physiological injury, not a mere emotional impulse, he meets with an accident arising out of and in the course of his employment. It is something unexpected, no doubt, in this sense, that I do not suppose the applicant thought for a moment, when he was doing what was plainly his duty in going to the rescue of his fellow workman, it would have this physiological effect on his system, but it had that effect." In the same case, Farewell L. J. said: "In my opinion, indeed, it can be said that nervous shock due to accident is as much personal injury due to accident, as a broken leg."

Hysterical blindness and neurosis were held to be compensable injuries in *re Hunnewell*, 220 Mass. 351, 107 N.

E. 934. See also *Madden v. Whitham* 38 N. J. L. J. 113, 10 N. C. C. A. 1045 (note).

For note on nervous shock or mental condition as an injury by accident arising out of and in the course of employment, citing decisions of the Industrial Boards of California, Ohio and Mass., see 10 N. C. C. A. 1041-1051.

In *Visser v. Michigan Cabnite Co.*, Mich. Indus. Acc. Bd. Bul. No. 3, p. 24, the common law rule was followed and it was held that mere fright without actual physical injury was not sufficient to sustain an award.

§ 92. Assault As An Accident.

An assault upon the person of an employee received when in the course of his employment and arising out of it may be an accident or injury which is compensable. But this is not true if the workman himself deliberately assaulted a fellow workman as he thereby removes all question of accident. *Shaw v. Wegan Coal & I. Co.* (Eng.) 3 B. W. C. C. 81, L. R. A. 1916A 310 (note). However injuries to an employee making the assault are within the Massachusetts act, which does not use the word accident, when received while performing a duty in forcibly removing a trespasser. *In re Reithel*, 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A 304, 11 N. C. C. A. 235. Generally when an employee acting in the course of and in the scope of his employment, and when not himself the aggressor, suffers injuries from an assault by a third person. [*Western Metal Supply Co. v. Pillsbury* (Cal.), 156 Pac. 491] or a fellow employee [*Western Indemnity Co. v. Pillsbury* 170 Cal. 686, 156 Pac. 398; *Hartnett v. Steen* 169 App. Div. 905, 153 N. Y. Supp. 1119, affirmed 216 N. Y. 101, 110 N. E. 170], the injuries are said to be accidental but they must arise "out of" as well as "in the course" the employment.

In *Trim Joint Dist. School v. Killey W. C. & Ins. Rep.* 359, 136 L. T. J. 605, 6 N. C. C. A. 1010 (note), "it was held that 'accident' in the English Workmen's Compensation Act of 1906, includes any injury not expected or designed by the injured workman himself, and therefore a premedi-

tated injury inflicted on a workman in the course of his employment in pursuance of a criminal conspiracy against him may be an 'accident' within the meaning of the act." For complete exposition of the English and American cases on the question of assault, see 6 N. C. C. A. (note) 1010-1022, L. R. A. 1916A (note), 309, 11 N. C. C. A. 235-254 (note).

§ 93. Assault Under Accident Insurance Policy.

An assault has been held to be an accident under an insurance policy in Kentucky. In *American Accident Company of Louisville v. Carson*, 99 Ky. 445, 36 S. W. 169, Thomas' Kentucky Words and Phrases 12, the court said: "While our preconceived notions of the term 'accident' would hardly lead us to speak of the intentional killing of a person as an accidental killing, yet no doubt can now remain, in view of the precedents established by all of the courts, that the word intentional refers alone to the person inflicting the injury, and if, as to the person injured, the injury was unforeseen, unexpected, not brought about through his agency designedly or was without his foresight, or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means, within the meaning of such policies."

§ 94. Overwork As An Accident.

In *Black v. New Zealand Shipping Co. (Eng.) W. C. & Ins. Rep. 480*, 6 B. W. C. C. 720, L. R. A. 1916A (note) 36, a man worked very hard, seventeen hours a day for several days and almost continuously for the last twenty-four hours. Six days later he dropped dead from heart failure. Some of the medical evidence attributed his death to the overwork above related. It was held that these facts did not justify the finding that the death was due to accident.

§ 95. Accident a Question of Law or Fact.

Whether or not the injury was caused by "accident" is generally considered to be a question of fact; and the

The first of these is the fact that the United States is a young nation, and its history is therefore a history of growth and development. The second is the fact that the United States is a large nation, and its history is therefore a history of expansion and conquest. The third is the fact that the United States is a diverse nation, and its history is therefore a history of conflict and compromise. The fourth is the fact that the United States is a nation of immigrants, and its history is therefore a history of assimilation and adaptation. The fifth is the fact that the United States is a nation of pioneers, and its history is therefore a history of exploration and discovery. The sixth is the fact that the United States is a nation of entrepreneurs, and its history is therefore a history of innovation and progress. The seventh is the fact that the United States is a nation of idealists, and its history is therefore a history of vision and aspiration. The eighth is the fact that the United States is a nation of pragmatists, and its history is therefore a history of action and achievement. The ninth is the fact that the United States is a nation of optimists, and its history is therefore a history of hope and faith. The tenth is the fact that the United States is a nation of pessimists, and its history is therefore a history of despair and defeat.

3.3. The Role of the Individual in American History

The role of the individual in American history is a complex and controversial issue. On the one hand, many Americans believe that the actions of individuals are the primary drivers of historical change. On the other hand, many Americans believe that the actions of individuals are largely determined by the social and economic conditions of the time. This section will explore the role of the individual in American history from the perspective of both of these views. The first view is that the actions of individuals are the primary drivers of historical change. This view is based on the idea that individuals are free to make choices and that these choices can have a significant impact on the course of history. This view is often associated with the idea of the "great man" or "great woman" who shapes the course of history through their actions. The second view is that the actions of individuals are largely determined by the social and economic conditions of the time. This view is based on the idea that individuals are not free to make choices, but are instead shaped by the forces of society and the economy. This view is often associated with the idea of the "mass man" or "mass woman" who is shaped by the forces of society and the economy. The role of the individual in American history is a complex and controversial issue, and it is one that continues to be debated by historians and the public alike.

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findings of the commission or trial court will not be disturbed if there is some evidence to support them. *Spooner v. Beckwith*, 183 Mich. 323, 149 N. W. 971, L. R. A. 1916A, 232 (note). But in New Jersey it has been held that, "the question of whether or not an injury is an 'accident' within the purview of the act is a mixed one of law and fact. *Roper v. Greenwood*, 83 L. T. 471. When applied to ascertained facts, it is a question of law. *Fenton v. Thornely & Co.*, App. Cas. 443, 19 T. L. R. 684." *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

§ 96. Death Resulting From Accidental Injury.

It has generally been held, that the death was caused by the original accidental injury, where it really resulted indirectly through a surgical operation which was necessary to relieve conditions caused by the accident. This statement is supported by the following cases: *Lewis v. Port of London Authority*, W. C. & Ins. Rep. 299. In this case Lewis died a considerable time after the accident from an operation for tumor of the kidneys caused by the accident. In the following cases the death resulted from post-operative pneumonia or ether-pneumonia. *In re Raymond*, Mass. Workm. Comp. Rep. [1913] 277; *In re Bentley*, 217 Mass. 79, 104 N. E. 432, 4 N. C. C. A. 559; *Jendrus v. Detroit Steel Products Co.*, 178 Mich. 265, 144 N. W. 563; L. R. A. 1916A 381, Ann. Cas. 1913D 476, 4 N. C. C. A. 864; *Favro v. Board of Public Library Trustee*, 1 Cal. Ind. Acc. Comm. Dec. (No. 15) 1.

For meaning under English Act of phrase "where death results from the injury," see L. R. A. 1916A (note) 132-134.

§ 97. Burden of Proof As to Accident.

The burden of proving that the injury, for which compensation is sought, was received by accident is upon the claimant *Reimers v. Proctor Pub. Co.* 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738, L. R. A. 1916A 39, 231.

§ 98. Accident May Be Established By Circumstantial Evidence.

While the fact that there was an accident can not be the subject of mere conjecture, *Steers v. Dunnewald* 85 N. J. L. 449, 89 Atl. 1007, 4 N. C. C. A. 676, L. R. A. 1916A 231, the fact that there was an accident which caused the injuries may be inferred from all of the facts and circumstances surrounding the case. *De Fazio v. Goldschmidt Detinning Co.* (N. J. Supp.), 88 Atl. 705, 4 N. C. C. A. 716, L. R. A. 1916A 40, 231. See also 10 N. C. C. A. (note) 618-645.

CHAPTER III

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Section.

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§ 99. In General.

Practically every one of the American Workmen's Compensation Acts use the phrase "arising out of and in the course of employment." This phrase was borrowed, in the first instance, from the British Act of 1906. Texas uses the phrase "in the course of employment"; Wyoming, "injured in extra hazardous employments"; West Virginia, "in the course of employment"; and Wisconsin "growing out of and incidental to employment."

§ 100. Arising "Out of" and "In the Course of" Employment—Meaning.

A large body of law has grown up around this phrase for the reason that the question whether or not a personal injury by accident arises "out of" and "in the course of" employment, is fundamental in determining whether the act applies. Before an injured man can recover compensation there are two elements which must be eliminated. He must prove that his injury arose "out of" and "in the course of" his employment. Neither alone is enough (see *In re McNicol*, *post*). Each phrase has a different meaning. (See *Steers v. Dunnenwald* 85 N. J. Law 449, 89 Atl. 1007, 4 N. C. C. A. 676.

In *Jane E. Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310, the court said: "It is well settled that to justify an award, the accident must have arisen 'out of' as well as 'in the course of' the employment, and the two are separate questions, to be determined by different tests, for cases often arise where both requirements are not satisfied. An employee may suffer an accident while engaged at his work or in the course of his employment which in no sense is attributable to the nature of or risks involved in such employment, and therefore can not be said to arise out of it. An accident arising out of an employment almost necessarily occurs in the course of it, but the converse does not follow. *Bradbury, Workmen's Compensation*, p. 398. 'Out of' points to the cause or source of the accident, while 'in the course of'

relates to time, place, and circumstances. *Fitzgerald v. W. G. Clarke & Son* (1908) 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101."

The same provision, in the same words, is found in the Massachusetts Workmen's Compensation Act. In *McNicol's* case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, 4 N. C. C. C. A. 522, the controlling question was whether fatal injuries received by an employee through blows and kicks administered by a fellow workman, "in an intoxicated and frenzied passion," arose out of the employment. The court said: "It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course' of the employment when it comes while the workman is doing the duty he is employed to perform. It 'arises out of' the employment when there is apparent to the rational mind upon consideration of all of the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which can not be fairly traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected

with the employment, and to have flowed from that source as a rational consequence."

Other courts have construed these words to practically the same effect as those quoted. See *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *State Ex. rel. Duluth Brewing & Malting Co. v. District Ct.*, 129 Minn. 176, 151 N. W. 912; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Scott v. Payne Bros.* 85 N. J. L. 446, 89 Atl. 927, 4 N. C. C. A. 682; *Hoenig v. Industrial Commission*, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339, 8 N. C. C. A. 192.

§ 101. "Arising Out of and In the Course of Employment" Under the English Decisions.

The law on this question is well summarized in *Ruegg's Employers' Liability and Workmen's Compensation* (Eng.) p. p. 373-374, 3 N. C. C. A. 270 (note).

"1. That the onus of proving both that the accident arose out of and in the course of the employment, rests upon the applicant.

2. That the accident does not arise out of and in the course of the employment if it is caused by the workman doing something entirely for his own purposes; or

3. The same result follows when the workman does something which is no part of his duty toward his employer, and which he has no reasonable grounds for thinking it was his duty to do.

4. The accident may arise out of and in the course of the employment if the act which occasioned it, although not strictly in the scope of the workman's employment, is done upon an emergency.

5. It may be said to arise out of the employment if, it being the workmen's duty to do the act, the accident arises from his doing it in an improper manner.

6. It may arise out of and in the course of the employment, if occurring on the employer's premises, when the workman has not actually commenced his work, or after he has finished.

7. It may arise out of and in the course of the employment if, the workman's duties not being clearly defined, he may reasonably have thought it a duty to do the thing in the course of which the accident occurred.

8. It does not arise out of and in the course of the employment, if occasioned by the wilfully tortious act of a fellow servant, when the risk of such an act can not be said to be one of the risks incidental to the service.

9. It may arise out of and in the course of the employment if, though occasioned tortiously, even wilfully, by the act of a third party, the risk of injury from such acts is found to be one of the risks incidental to the employment."

§ 102. Accident Must Result From Risk Reasonably Incident to Employment.

In *Bryant v. Fissell*, 84 N. J. Law 42, 86 Atl. 458, 3 N. C. C. A. 585 the facts were as follows:

Bryant met his death by reason of the falling of a bar of metal from an upper floor of the building on which he was at work, the fall being caused by the act of an employee of another contractor on the building. The employer, Fissell, claimed that the injury was not covered by the law.

The three necessary points to be established by the claimant before compensation should be due were held to be, first, that the death was caused by an accident, second, that the injury arose out of the employment, and third that it was in the course of employment. Having concluded that the injury was accidental, Judge Trenchard, speaking for the court, said:

"It remains to be considered whether the accident arose both 'out of and in the course of his employment.' For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment. As was said by Buckley, L. J., in *Fitzgerald v. Clarke & Son* (1908) 2 K. B. 796, 77 L. J. K. B. 1018: 'The words "out of" point, I think, to the origin and cause of the accident; the words "in the course of," to the time, place, and circumstances under which the accident takes

place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words "out of" involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment.' We conclude, therefore, that an accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time. That the findings of fact in the present case justified the conclusion that the accident to Bryant occurred 'in the course of' his employment is beyond dispute. We are also of opinion that the conclusion of the common pleas judge that the accident arose 'out of' the employment was likewise justified.

We conclude, therefore, that an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it.

A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.

And a risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment."

§ 103. Accidents on Street.

The general rule, supported by the weight of authority, is that when employees are injured on the street, from causes to which all other persons using the street are likewise exposed, the injury can not be said to arise out of the employment. In *Hopkins v. Michigan Sugar Co.*, 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A, 310, an employee whose

business for the company required him to travel on the streets between the various establishments of the employer, slipped on an ice-covered sidewalk while running to catch a street car. He struck his head and received injuries from which he died. In refusing to make an award under the Michigan act, the court said: "Slipping upon snow-covered ice and falling while walking, or running, is not even what is known as peculiarly a 'street risk'; neither is it a recognized extra hazard of travel, or particularly incidental to the employment of those who are called upon to make journeys between towns on business missions. * * * This unfortunate accident resulted from a risk common to all, and which arose from no special exposure to dangers of the road from travel and traffic upon it; it was not a hazard peculiarly incidental to or connected with the deceased's employment, and therefore is not shown to have a casual connection with it, or to have arisen out of it."

To the same general effect see the following cases: *Rodger v. Paisley School Board*, 49 Scot L. R. 413, 5 B. W. C. C. 547; *Symonds v. King*, 8 B. W. C. C. 189; *Sheldon v. Needham*, 7 B. W. C. C. 471; *Green v. Shaw*, 5 B. W. C. C. 573; *Slade v. Taylor*, 8 B. W. C. C. 65; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665, affirmed 218 N. Y. 325, 113 N. E. 332; *DeVoe v. N. Y. State R. Co.*, 169 App. Div. 472, 155 N. Y. Supp. 12. See L. R. A. 1916A (note), 314, where the above cases are discussed.

"Some of the cases, however, make a distinction in the case of workmen whose duties are such that they are obliged to be continuously upon the street, or at least to spend a considerable portion of their time there; the theory being that the very nature of their employment subjects them to street dangers, more than persons are generally subjected, and consequently injuries from such dangers must be considered as arising out of their employment." L. R. A. 1916A (note), 314, citing following authorities: *McNiece v. Singer Sewing Machine Co.*, 4 B. W. C. C. 351; *Pierce v. Providence Clothing & Supply Co.*, 4 B. W. C. C.

242; *Martin v. Lobibond*, 7 B. W. C. C. 243, 5 N. C. C. A. 985; *Bett v. Hughes*, 8 B. W. C. C. 362; *Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327, 4 N. C. C. A. 110.

§ 104. Before or After Working Hours or Going to or From Work.

The general rule is that workmen's compensation acts do not apply to injuries received in going to or coming from work. But the nature of the contract of employment and the circumstances surrounding the accident might be such as to bring it within the scope of the act. In the case of *De Constantine, etc., v. Public Service Commission of the State of W. Va.* 75, W. Va. 32, 83 S. E. 88, L. R. A. 1916A, 329, the court stated the general rule in the head note as follows: "An injury incurred by a workman in the course of his travels to his place of work, and not on the premises of the employer, does not give the right to participation in such fund, unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the servant in going to and returning from his work.'" The court continued: "Since injury after termination of actual work, while on the premises of the employer and in pursuit of the usual way of leaving same, is held to be within the course of employment and to have arisen out of same, it seems clear that an injury to a workman while coming to his place of work on the premises of the employer, and by the only way of access, or the one contemplated by the contract of employment, must also be regarded as having been incurred in the course of employment and to have arisen out of same. If, in such case, injury does not occur on the premises, but in close proximity to the place of work and on a road or other way intended or contemplated by the contract as being the exclusive means of access to the place of work, the same principle would apply and govern. If the place at which the injury occurred is brought within the contract of employment by the requirement of its use by

the employee, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment and the injury thus arises out of the employment and is incurred in the course thereof. But, on the contrary, if the employee at the time of the injury has gone beyond the premises of the employer or has not reached them, and has chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

In *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409, the court after discussing the cases on this subject said: "In applying the general rule that the period of going to and returning from work is not covered by the act, it is held that the employment is not limited by the exact time when the workman reaches the scene of his labor and begins it nor when he ceases, but includes a reasonable time, space and opportunity before and after, while he is at or near his place of employment. One of the tests sometimes employed is whether the workman is still on the premises of his employer. This while often a helpful consideration is by no means conclusive. A workman might be on the premises of another than his employer, or in a public place, and yet be so close to the scene of his labors, within its zone, environments, and hazards, as to be in effect at the place and under the protection of the act; while, on the other hand, as in case of a railway stretching endless miles across the country, he might be on the premises of his employer and yet far removed from where his contract of labor called him. The protection of the law does not extend, except by special contract, beyond the locality, or vicinity, of the place of labor."

In *City of Milwaukee v. Althoff*, 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A, 327, the facts were as follows:

The circuit court of Dane County entered a judgment affirming an award of \$2,138.11 as compensation made in favor of Minnie Althoff, on account of the death of her

father, William A. Althoff. The deceased, in accordance with a city ordinance fixing the hours of labor at eight, began work at 8 a. m. and finished at 5 p. m. He was required to report to his foreman at 7:30 each morning to receive instructions as to where he was to work. On the morning of May 3, 1912, he reported thus, and on receiving his instructions proceeded toward the place where he was to work. While on the way he fell on a sidewalk and injured his knee. He died on September 21, 1912, and it was found on sufficient evidence that his death was due to the injury which he received when he fell. On appeal the supreme court affirmed the judgment, holding that the accident was within the terms of the statute, which provides that compensation shall be paid where the employee at the time of the accident is "performing service growing out of and incidental to his employment." The following is quoted from the remarks of Judge Barnes, who delivered the opinion of the court:

"In the instant case, when the servant reported to his foreman and received his instructions for the day and proceeded to carry out these instructions by starting for the place where he was to work, we think the relation of master and servant commenced, and that in walking to the place of work the servant was performing a service growing out of and incidental to his employment."

In *De Constantin v. Public Service Commission* 75 W. Va. 32, 83 S. E. 88, L. R. A. 1916A 329, the plaintiff, De Constantin, was the acting royal consul of Italy, and made application to the court for an order requiring the public service commission to allow a rejected claim for compensation on behalf of the dependents of Giuseppe Zippi.

Zippi was killed by a train on the main line of the Baltimore & Ohio Railroad. He was in the employ of a firm engaged in construction work on a portion of the road. While his death occurred a few minutes before the time for him to begin work in the morning, the evidence did not show that the main line where it happened was the only or even the proper route for access to his place of work, and the

commission rejected the claim on the ground that the injury was not in the course of employment. The court sustained this view and refused the order applied for. Its conclusions are shown in the following syllabus prepared by the court:

“An injury incurred by a workman in the course of his travel to his place of work, and not on the premises of the employer, does not give right to participation in such fund, unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the servant in going to and returning from his work.”

In *De Voe v. New York State Rys.* 218 N. Y. 318, 113 N. E. 256, affirming 169 App. Div. 472, 155 N. Y. Supp. 12, the widow of Edward De Voe was awarded compensation of \$5.59 weekly during widowhood, together with funeral expenses, for the death of her husband. He had been in the employ of the company named, which was a self-insurer, as a motorman, and was run down and killed by an automobile while going from the barn to take a car to go and have his watch tested. This testing was a requirement of his employment, and was to be done every two weeks under penalty. Employees were not paid for their time in having the test made, but the person making it was designated and was paid by the company. The court set aside the award, Judge Woodward, who delivered the opinion, saying in part:

“The crucial question at all times is whether he is engaged in the hazardous employments mentioned in the statute, for it was only as to these that the legislature has required the employer to provide compensation.

The evidence is that the deceased had closed his day's work, and made his report of his time in writing, on which his wages were based, and that he had passed out of the employer's barn, and had reached the middle of the street, when he was struck by a passing automobile, and if the master is liable here he must be so because of a general insurance liability. It can not be under the terms of the

workmen's compensation act. The State has not yet required the employer to become a general insurer of the lives of his employees. It has simply required that they be protected while engaged in the performance of certain hazardous employments."

In re Donovan 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C 778, 4 N. C. C. A. 549, the employee Donovan secured a decree in his favor in the superior court of Suffolk County. From this the insurer of his employer appealed, and the point of interest was as to whether the injury, which occurred while the employee was riding from his place of work in a wagon furnished by the employer, was within the scope of the act. The court decided that it was, affirming the decree of the court below. The court said:

"From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. [Cases cited.]

The finding of the industrial accident board that Donovan's transportation was 'incidental to his employment' fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real, feature or detail of the contract."

For notes on this phase of injuries arising out of and in the course of employment, see L. R. A. 1916A, 331-333; 7 N. C. C. A., 409-434; 12 N. C. C. A., 368-398; 12 N. C. C. A. 652-672

§ 105. Going to Lunch or Preparing to Go.

The general rule is that injuries received while in the act leaving or preparing to leave the place of employment to get refreshment arise out of and in the course of employment.

In *Terlecki v. Strauss, et al.*, 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584, the court said: "A factory employee quit work at her machine shortly before noon, and was, in accordance with custom, combing particles of wool out of her hair, preparatory to going home, at a point away from her machine, when her hair was caught in other machinery and she was injured. . . . The question whether the accident arose out of the employment is perhaps more doubtful. The employment was not, indeed the proximate cause of the accident, but it was a cause in a sense that, but for the employment, the accident would not have happened. The employment was one of the necessary antecedents to the accident." It was held that the accident rose out of and in the course of the employment.

In *Rayner v. Sligh Furniture Co.*, 180 Mich. 168, 146 N. W. 665, 4 N. C. C. A. 851, L. R. A. 1916A 22, Ann. Cas. 1916A 386, an employee at the sound of the noon whistle to quit work, ran to punch the time clock. He ran into a fellow employee, breaking several ribs, one of which punctured his lungs and caused death. The court said: "At the time of the accident, Rayner was in the performance of a duty imposed upon him by the employer. When the noon whistle blew, it was obligatory upon him, before leaving the place of his employment, to punch the time clock. The performance of this duty, if not the proximate cause, was a concurring cause of his injury. In *Fitzgerald v. Clarke* [1908], 99 L. T. 101, 1 B. W. C. C. 197, Buckley, L. J., stated the rule as follows: "The words 'out of and in the course of employment' are used conjunctively, not disjunctively, and, upon ordinary principles of construction, are not to be read as meaning 'out of,' that is to say 'in the course of.' The former words mean something different

from the latter words. The workman must satisfy both one and the other. The words 'out of' point, I think to the origin or cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. We are well satisfied that the accident was an industrial accident within the meaning of the compensation act, and arose 'out of and in the course of his employment.' "

In *Clem v. Chalmers Motor Co., et al.*, 178 Mich. 340, 144 N. W. 848, 4 N. C. C. A. 876, L. R. A. 1916A 352, Clem was working on the top of a building and when called to lunch by the foreman, he started to come down a rope instead of going down a ladder provided for that purpose, and was fatally injured. In holding that the accident arose out of and in the course of his employment, the court said: "If when the call to come to lunch was made, Mr. Clem, in responding to the call, had inadvertently stepped into an opening in the uncompleted roof, or in company with others had in the attempt to reach with the ladder, got too near the edge of the roof and fallen and been hurt, would it be claimed that the injury did not arise out of and in the course of his employment, the getting of his luncheon under the conditions shown, was just as much a part of his duty as the laying of a board or the spreading of roofing material."

In *re Sundine*, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A 318, 5 N. C. C. A. 616, the facts were as follows:

F. L. Dunne & Co. were merchant tailors; Edward Olsen made clothing for the company in its workshop, and Emily Sundine was employed by Olsen. The insurance company holding Dunne & Co.'s risks admitted that under the Massachusetts compensation act it was liable for in-

juries to the employees of the independent contractor, but contended that the injury did not arise out of and in the course of employment. The injury was sustained while the employee was out of the workshop for the purpose of getting lunch, and upon a flight of stairs which was not under the control of either the company or Olsen, but which furnished the only access to the shop. Judge Sheldon, in expressing the decision of the court that the compensation must be paid, said:

“Her employment was by the week. It would be too narrow a construction of the contract to say that it was suspended when she went out for this merely temporary purpose, and was revived only upon her return to the workroom. It was an incident of her employment to go out for this purpose.

Nor do we regard it as decisive against the petitioner that she was injured while upon stairs of which neither Olsen nor Dunne & Co., had control, though they and their employees had the right to use them. These stairs were the only means available for going to and from the premises, where she was employed, the means which she practically was invited by Olsen and by Dunne & Co. to use.

It was a necessary incident of the petitioner's employment to use these stairs. We are of opinion that according to the plain and natural meaning of the words an injury that occurred to her while she was so using them arose ‘out of and in the course of’ her employment.”

In *Hills v. Blair* 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409, Leone H. Hills made application for an award of compensation before the industrial accident board against the receivers of the Pere Marquette Railroad Co. on account of the death of her husband, who had been a section hand on the railroad. The board awarded compensation to the applicant, and the receivers appealed. Hills on the day of the accident, had failed to take his dinner as was usual, it being customary for the crew to eat their lunch at a car house. At noon he started to hurry to his home along the

tracks, a distance of about 2,000 feet. As he went along a footpath between the tracks, a freight train was approaching from his rear. A little later his body was found about half the distance from the car house to where he would have left the track near his home, having evidently been thrown against a switch standard, which was bent. It was in dispute whether he probably, in walking or running alongside the train, went too near it and was thrown by it, or whether he attempted to board it to ride, or after having so boarded it attempted to get off when he found that the speed was increasing and the train was not to stop at that station. The board having taken the former view in accordance with the theory of the plaintiff the court held that it should adopt the same view, there being no direct evidence as to how the accident occurred. It held, however, that the injury did not arise out of and in course of the employment, and the order granting the award was reversed, the employee having left the place of his employment during the intermission allowed for the eating of lunch, and not remaining on the premises, in which case the relation of employer and employee would not have been broken.

A foreman received an injury to the hand when it touched a revolving fan in a hot air pipe. At the time he was attempting to place a bottle in the pipe and warm it for his lunch. Employees were permitted to do this by the employer, but in an adjoining room. It was held that the accident did not arise out of or in the course of employment. *Mann v. Glastonbury Knitting Co.*, 96 Atl. 368, 90 Conn. 116.

The following British cases held that injuries received while seeking refreshment arose out of and in the course of employment. *Carinduff v. Gilmore*, 48 Ir. Law Times 137, 7 B. W. C. C. 981; *Low v. General Steam Fishing Co.*, 25 Times L. R. 787, 53 Sol. Jo. 763; *Martin v. Lovibond*, 7 B. W. C. C. 243; *Keenan v. Flemington Coal Co.*, 40 Scot. L. R. 144, 10 Scot. L. T. 409; *Earnshaw v. Lancashire & Y. R.*

Co., 5 W. C. C. 28; *Morris v. Lambeth Borough Council*, 22 Times, L. R. 22; *McLaughlin v. Anderson*, 48 Scot. L. R. 349, 4 B. W. C. C. 376; *Blovelt v. Sawyer*, 20 Times L. R. 105; *McKrill v. Howard*, 2 B W. C. C. 460. A Synopsis of the holding of each of the above cases can be found in L. R. A. 1916A (note), 320. See also 7 N. C. C. A. (note) 431-433.

For note on accidents occurring to employees during intermission from work as arising out of and in the course of employment see 12 N. C. C. A. 551-561.

§ 106. Sportive Acts.

Whenever an employee is injured through some sportive act of his own, the rule is that the accident does not arise out of his employment, although it may arise in the course of it. The same is generally true where two or more employees join in an act and take part in the fun.

In *McIntyre v. Rodger & Co.*, 6 T. 176, 41 Scot. L. R. 476, 11 Scot. L. T. 467, it was said: "If two workmen leave their work and begin to indulge in horseplay, they are not doing their master's work, but, on the contrary, are doing what is absolutely inconsistent with the carrying on of their master's work, and it can not be said that anything which happens in consequence of such conduct arises out of the employment." But where the injured employee took no part in the funmaking it has been held that the accident arose out of the employment. Thus in *Knopp v. American Car Foundry Co.*, 186 Ill. App. 605, 5 N. C. C. A. 798, a workman was operating a trip-hammer and another in a spirit of fun placed a tin can on the lower die. While attempting to knock this out of the way, the hammer came down on his hand and crushed it so that it had to be amputated. The court said: "Had appellee, on going to work in the morning found something on the lower die which interfered with his work, it would no doubt have been his duty to remove it, and if injured in doing so he would properly be entitled to the protection of this law. How can his rights be affected by the fact that a man who placed the can on the

die says he did so 'just to have some fun.' So far as the proper continuance of the work was concerned, it was immaterial whether the obstruction was placed there by Novak for fun or was placed there by some one by mistake or came there through some accident. Had Knopp been engaged in joking with Novak or playing with him and in carrying on their pranks, Novak would put the can on the die and Knopp remove it, both entering into the spirit of the transaction in concert, it may be that the appellee could not be held to have received his injury in the course of his employment. But in this case appellee took no part in the joking, but proceeded to clear the die of the obstruction upon it so that he could continue the work he was employed by appellant to do; and what he did was for the benefit of his employer. The proofs appear to us to show plainly that the injury sustained by appellee arose out of and in the course of his employment and that he is entitled to the benefit of the law under which the proceedings were brought."

In *Hulley v. Moosbrugger*, 87 N. J. L. 103, 93 Atl. 79, L. R. A. 1916C 1203, 8 N. C. C. A. 283, a plumber's helper while going into a bin to get some fittings dodged the arm of a fellow workman thrown out in fun to stop him. He fell to a concrete floor, receiving injuries from which he died. The court allowed compensation but on different reasoning than in the Knopp case, *supra*. The court said: "In the case under consideration, it appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age, or even mature years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to every one who employs labor. At any rate, it can not be said that the attack made upon the decedent was so disconnected from the decedent's employment as to take it out of the class of risks reasonably incident to the employment of labor. At

common law the master was not liable for an injury to his servant caused by the negligent act of a fellow servant upon the ground that the servant assumed the risk. Under the workmen's compensation act, the master assumes all risks reasonably incident to the employment."

In *De Filippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761, Millie De Filippis, a girl 15 years of age was employed as operator of a buttonhole machine in the manufacture of shirts. There were in the factory two adjoining toilet rooms separated by a partition. The employee went into one of these, and felt something touch her on the arm. She looked through the crack to see where the article came from, and a girl thrust some scissors through the crack into her right eye, causing nearly a total loss of vision of the eye. The employer and insurer appealed from an award of compensation to her. The court held that the occurrence was an accident, since it was unlooked for, and not intended by either employee. A number of cases were reviewed in which it had been determined that accidents more or less similar did or did not arise out of the employment, largely English cases, but including the Court's decision in favor of the employee in *Hulley v. Moosbrugger* (93 Atl. 79). It is pointed out, however, that in New Jersey, where the last-named case arose, all employment excepting casual employment is covered, while in New York only certain hazardous employments are included. It was held that the accident was not reasonably incidental to the service, and that the judgment must be reversed.

The following British cases support the rule that injuries sustained while engaged in sportive act do not arise out of the employment. *Fitzgerald v. Clarke & Son*, 1 B. W. C. C. 197, 2 K. B. 796; *Mullen v. D. Y. Stewart & Co., Ltd.*, 45 Scot. L. R. 729, 1 B. W. C. C. 204; *Wilson v. Laing*, 46 Scot. L. R. 843, 2 B. W. C. C. 118; *Shaw v. Wigan Coal & Iron Co.*, 3 B. W. C. C. 81; *Cole v. Evans, Son, Lescher and Webb, Ltd.*, 4 B. W. C. C. 138; *Wrigley v. Nasnyth, Wil-*

son & Co., W. C. & Ins. Rep. [1913], 145 ; Clayton v. Hardwick Colliery Co. [1914], W. C. & Ins. Rep. 343, 8 N. C. C. A. (note) 287.

The same rule has been sustained by the following decisions of Workmen's Compensation Boards:

Kock v. Oakland Brewing & Malting Co., 1 Cal. Ind. Acc. Comm. Dec. (No. 20, 1914) 23, 8 N. C. C. A. (note) 285; Hawley v. Am. Mut. Lia. Ins. Co. (Mass), 1 Nat. Comp. Journ. (Nov. 1914) 20, 8 N. C. C. A. (note) 285; In re Zelavzmi, 1 Ohio Ind. Comm. Bull. (No. 7) 87, 8 N. C. C. A. (note) 286. For exhaustive discussion of this subject see notes, 3 N. C. C. A. 283; 5 N. C. C. A. 798; 8 N. C. C. A. 283; 9 N. C. C. A. 663; 12 N. C. C. A. 789-799.

§ 107. Death or Injury by Lightning or Other Act of God.

The courts are in conflict as to whether or not death by lightning constitutes an accident arising out of and in the course of employment. The better ruling seems to be that they are not covered. One of the basic principles upon which workmen's compensation acts are founded is that the workingman needs protection from the natural hazards of the business in which he is engaged other than that afforded by the common law. The danger of death or injury by lightning is common to all classes of people. While a stroke of lightning is within the definition of the word "accident" and may be suffered "in the course of employment" it seems that the meaning of the words must be strained to say that it "arose out of" the employment. However, there are authorities holding both ways. In Michigan, in the case of Klawinski v. Lake Shore & Michigan Southern R. R. Co., 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A 342, the death of a section hand, taking shelter in a barn pursuant to the orders of a foreman and while there struck by lightning and killed, was held not to be covered by the Michigan act. After considering the decided cases the court said: "It is our opinion in the instant case that the claimant's husband did not come to his death as a result of 'a personal injury arising out of and in the course of his

employment,' within the meaning of the workmen's compensation law. It is clear from the stipulated facts that this injury was in no way caused by or connected with his employment through any agency of man which combined with the elements to produce the injury; that the plaintiff's decedent by reasons of his employment was in no way exposed to injuries from lightning other than the community generally in that locality."

In the case of *Hoenig v. Industrial Commission of Wisconsin et al.*, 159 Wis. 646, 150 N. W. 966, L. R. A. 1916A 339, an employee, working on a dam, was struck by lightning and killed. It was contended that, when the relation of employer and employee had been established, that he was performing services growing out of and incidental to his employment and that the injury was proximately caused by accident not intentionally self-inflicted, a case for compensation was made out. The court said: "The act should be construed in the light of the history of its passage. Pursuant to chapter 518, Laws of 1909, a committee was appointed which investigated and presented a report to the legislature of 1911. This report tends to show the construction placed upon the act by the committee, and that it was not intended to include other than industrial accidents or 'hazards incident to the business.' . . . It seems quite clear that the injuries for which compensation is to be paid, under the act, are such as are incidental to and grow out of the employment. . . . The question, therefore, arises whether the injuries received by Hoenig were incidental to and grew out of the employment. This proposition turns upon the nature of the hazard to which the deceased was exposed at the time and place of the injury. Was he exposed to a hazard from lightning stroke peculiar to the industry? The Industrial Commission held that he was not, and that the exposure to hazard from lightning stroke at the time and place of the injury was not different, substantially, from that of the ordinary out of door work." The court denied compensation in this case.

A contrary view is taken by the Minnesota court in the case of *State of Minnesota, Ex rel., People's Coal and Ice Co. v. District Court of Ramsey County et al.*, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A 344. In that case a driver of an ice wagon, having a regular route, rain or shine, took shelter under a tree during a storm and was killed by a stroke of lightning. The court concluded that this was an accident arising out of and in the course of employment. After discussing the English, Irish and American cases, pro and con, the court comes to the above conclusion without reciting its reasons in the opinion.

The English court in *Andrew v. Farnsworth Industrial Society*, 2 K. B. 32, 90 L. T. N. S. 611, supports the Minnesota view. While the Irish case of *Kelly v. Kerry County Council*, 42 Ir. Law Times 23, 1 B. W. C. C. 194, supports the Michigan and Wisconsin holdings.

§ 108. Insanity and Suicide.

The Massachusetts court has held that where a workman came to his death by suicide while insane as a result of an injury, the death was compensable if there was an unbroken chain of causation between the injury and the death. But it must be borne in mind that the word "injury" alone is used in the Massachusetts act and that under the acts generally the injury must be by "accident" and the death, "by accidental injury." Yet in *Malone v. Cayzer*, 45 Scot, L. R. 351, 1 B. W. C. C. 27, L. R. A. 1916A (note), 339, it was held that death from suicide, committed while the workman was insane as a result of the injury, may be found to be due to accident.

In the case of *Standard Accident Ins. Co. v. Sponatski*, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A 333, 8 N. C. C. A. 1025, Sponatski "received an injury in the course of and arising out of his employment through a splash of molten lead into his eye on September 17, 1913. He was treated at a hospital until October 13, 1913, when, as was found by the Industrial Accident Board, 'while insane as a result of his injury, he threw himself from a window and

was fatally injured.' The board found further that 'this insanity was brought about and resulted from the injury,' and that while the evidence was very close upon that point, the death 'did result from an uncontrollable impulse and without conscious volition to produce death,' under *Daniels v. New York, N. H. & H. R. Co.*, 183 Mass. 393, 62 L. R. A. 751, 67 N. E. 424. . . . It is of no significance whether the precise physical harm was the natural and probable, or the abnormal and inconceivable, consequence of the employment. The single inquiry is whether in truth it did arise out of and in the course of that employment. If death ensues, it is immaterial whether that was the reasonable and likely consequence or not; the only question is whether in fact death, 'results from the injury.' Part 2, art. 6. When that is established as the cause, then the right to compensation is made out. If the connection between the injury as the cause and the death as the effect is proven, then the dependents are entitled to recover even though such a result before that time may never have been heard of, and might have seemed impossible. The inquiry relates solely to the chain of causation between the injury and the death." Compensation was awarded to the dependents of the suicide.

In *Milliken v. Travelers' Ins. Co.*, 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A 337, the same court held that pneumonia contracted by an employee, who because of prior injuries, suffers a lapse of memory while in charge of his master's team, and, in attempting to get the horses to the stable, loses his way, wanders from the wagon into a swamp and suffers exposure during the night, is not an injury "arising out of" his employment within the meaning of a workmen's compensation act.

But insanity can not be inferred merely from the fact that a workman who had received an injury to his eye, and was suffering great pain, committed suicide, although there was no other reason advanced for the act except the in-

jury. *Grime v. Fletcher*, 8 B. W. C. C. 69, L. R. A. 1916A (note), 339.

And it is error for the county judge to find that a workman committed suicide while insane as a result of an injury, where the workman's body was found in a canal, and there was no evidence to show how he came to be in the canal, and there had been no symptoms of a suicidal tendency, although he had become depressed and irritable and restless as a result of the injury. *Southall v. Cheshire County News Co.*, 5 B. W. C. C. 251, L. R. A. 1916A (note), 339.

When a workman is found dead without evidence as to what the cause of death was it has been held that as between accident and suicide the natural legal presumption favors accident. *Milwaukee Western Fuel Co. v. Ind. Comm.* 159 Wis. 635, 150 N. W. 998; *Sorensen v. Menasha Paper Co.*, 56 Wis. 342, 14 N. W. 446; *W. R. Rideout Co. v. Pillsbury* — Cal. — 159 Pac. 435.

§ 109. Seeking Toilet Facilities.

If an employee is injured by accident while availing himself or in the act of going to avail himself of toilet facilities, the accident and injury arise out of and in the course of employment. If the employer furnishes adequate toilet facilities, accidents to servants while seeking relief elsewhere at places of their own choice are not covered. *Zabriskie v. Erie R. R. Co.*, 86 N. J. L. 266, 92 Atl. 385, L. R. A. 1916A 315, 4 N. C. C. A. 778; *De Filippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761; *Rose v. Morrison*, 4 B. W. C. C. 277, L. R. A. 1916A (note), 318; *Thomson v. Flemington Coal Co.*, 4 B. W. C. C. 406; *Cook v. Manver's Main Collieries*, 7 B. W. C. C. 696; *Cogdon v. Sunderland Gas Co.*, 1 B. W. C. C. 156, L. R. A. 1916A (note), 318.

In *Zabriskie v. Erie R. R. Co.*, *supra*, the employees had no toilet facilities in the building where they were at work but were compelled to cross a public street to another building of the employer to reach them. *Zabriskie* while

crossing the street was run over by a vehicle and killed. The court said: "There can be no doubt that the trial court was fully justified in finding that the accident occurred in the course of the employment of the deceased; that it took place during regular working hours and while he was answering a call of nature which is liable to occur at any time. It was argued that he was not doing his employer's work at the time, but there is little or no force in this, for in the end it is as important to the employer as to the employee that the latter may do his work without unnecessary physical inconvenience. The trial court was also justified in finding upon the evidence adduced that the accident arose out of the employment. The difficulty in this case arises from the fact that the place where the deceased was struck was a public street, and that he was struck by an independent agency, to-wit, an automobile driven by a stranger and lawfully in said street. Hence it is argued that the deceased was not, and could not have been, injured by any cause for which the master was responsible, or to which he was subjected by the conditions of his employment. But we consider this argument also to be without support. It is not only conceivable, but it is a matter of daily occurrence that employees are required to do their work under conditions which render them liable to injury from outside agencies."

§ 110. Heat and Cold.

Injuries from heat and cold, such as sunstroke, heat prostration, freezing and frost-bite, caused by the severity of the natural elements, are not generally held to be accidents arising out of and in the course of employment, unless the nature of the employment is such that those dangers are one of the natural hazards connected with it. *Fensler v. Associated Supply Co.*, 1 Cal. Ind. Acc. Comm. Dec. 447. On the other hand, prostrations from artificial heat have been generally considered within the scope of the acts. For the same reason injuries sustained from frost-bite in artificial ice factories would be covered, although no case

has been found to this effect. For note on injury or death caused by atmospheric conditions as an accident arising out of and in the course of employment, see 12 N. C. C. A. 308-327.

§ 111. Frostbite.

In *Dorrance v. New England Pin Co.*, Conn. Super Ct., 1 Nat., Comp. Journ. (July, 1914) 23, 6 N. C. C. A. 709 (note), a night watchman, whose duties included keeping the fires alive, had to go out in the cold occasionally to get coal and claimed to have thus sustained a frozen toe. After stating that an injury must arise out of and in the course of employment the court said: "In other words, a personal injury suffered by a workman while pursuing his duties gives him in itself no claim for compensation under the act; some essential relation and connection between the employment and the injury itself must appear. It seems to me that the legislative intent so disclosed, and, the manifest purpose of the act to limit liability to cases where the risk of the precise injury involved is plainly incidental to the employment, call for a somewhat stricter application of the test than the cited cases recognize. There are, of course, employments where unusual exposure to extremes of heat and cold is a part of the work and an obvious hazard, but I think there is no warrant for a construction of the act which would create a liability of injuries of this character due to a casual or occasional exposure, in an employment which does not subject the workman to open air work, and in a climate where sudden and severe changes in temperature are expected."

The above is apparently the decision of an inferior court, but it is in accord with the British views as expressed in the Canadian case of the *Canada Cement Co.*, 22 Que. K. B. 432, 12 D. L. R. 303, 7 N. C. C. A. 982, and the English case of *Warner v. Couchman*, 80 L. J. K. B. 526, 1 N. C. C. A. 51, 5 B. W. C. C. 177, and *Karemaker v. Owners of S. S. Corsican*, 4 B. W. C. C. 285.

In *McManaman's* case 113 N. E. 286 — Mass. — the

finding of fact by the Board was: "The evidence shows that the employee, John McManaman, was especially exposed, by reason of the performance of his work as a long-shoreman, to materially greater danger and a likelihood of getting frozen than the ordinary person or outdoor worker on the date upon which he received the personal injury, a frostbite." The court after considering the English cases said: "Although the question is a close one, we are of opinion on the whole that the evidence before the Board warranted the finding made by them."

A finding similar to the above was made in the case of *Skougstad v. Star Coal Co.*, Rep. Wis. Ind. Comm. 1914-15, page 31. But the contrary was held where the workman was not subjected to any extraordinary conditions. *Aillo v. Milwaukee Refrigerator Transit & Car Co.*, Rep. Wis. Indus. Comm. 1914-15, page 18.

§ 112. Sunstroke.

No American decisions by courts of last resort have been found on this subject. The English cases generally hold sunstroke not to be an accident arising out of and in the course of employment. *Robson, Eckford & Co., Ltd., v. Blakey*, 49 Scot. L. R. 254, 5 B. W. C. C. 536; *Rodger v. Paisley School Board*, 49 Scot. L. R. 413, 5 B. W. C. C. 547; *Olson v. The Dorset*, 6 B. W. C. C. 658. It has been held that the heat of the sun intensified and supplemented by artificial heat and causing prostration was an accident arising out of and in the course of employment. *Davies v. Gillespie*, 28 T. L. R. 6, 56 Sol. J. 11, 5 B. W. C. C. 64, and *Morgan v. S. S. "Zenaida"*, 25 T. L. R. 446, 2 B. W. C. C. 19. The same has generally been held where artificial heat alone produced the prostration. *Ismay, Imrie & Co. v. Williamson*, 1 B. W. C. C. 232, 6 N. C. C. A. 714 (note). A synopsis of the above cases may be found in a note in 6 N. C. C. A. 710-715.

In *Tank v. City of Milwaukee*, Wis. Workm. Comp. Rep. [1914] 80, the commission held that a death by sunstroke of a man 63 years of age who was shoveling stone

from a car on a hot day, did not arise out of and in the course of employment.

The contrary ruling was made by the Illinois Industrial Board, in *Kringle v. Myers*, 6 N. C. C. A. (note) 713, where a sunstroke was suffered by a plumber's laborer while working in a trench.

In Ohio, in *Ress v. Youngstown Sheet & Tube Co.*, where an employee suffered heat prostration, probably largely from artificial heat, it was held to be an accident for which compensation should be awarded. 6 N. C. C. A. (note), 713.

The general rule, as announced by the cases up to this time, is that sunstroke is not an injury arising out of and in the course of employment, because it is not due to a risk incidental to the employment but one which must be taken by everybody.

§ 113. Injuries From An Assault by Fellow Employee or Third Person.

A general rule can not well be laid down as to where injuries by assault arise both "out of" and "in the course of" employment. They arise "in the course of" employment more frequently than "out of" it. The nature of the employment, the question whether it was provoked by the person claiming compensation, and all the circumstances surrounding the occurrence must be taken into consideration in determining whether the injuries received by assault are compensable. But the first thing to be decided is whether the assault is an "accident" or an "injury" within the meaning of the act (see § 92), and then the facts must be carefully scrutinized to see whether it arose "out of" and "in the course of" the employment within the well recognized meaning of those terms.

In *re Reithel* 222 Mass. 163, 109 N. E. 951, L. R. A. 1916A 304, 11 N. C. C. A. 235, the court said: "This finding [of the industrial accident board] presents a case of wholly unprovoked murder. The question is, whether this personal injury was one 'arising out of and in the course

of' employment of Reithel. Plainly it arose in the course of his employment. It came upon him while he was doing his duty in the place and manner required by his contract of hire.

The only point of difficulty is whether it also arose out of the employment. The industrial accident board has found that it did. The facts are not in dispute. The question to be decided is whether as a matter of law this finding was erroneous.

The employee was the superintendent of a mill. It was a part of his general duty to order trespassers from the premises. In this respect he was required to deal with those more or less heedless of the rights of others in their conduct. Superimposed upon this general obligation resting on him by reason of his contract of employment was a special one respecting Bombard. It came into existence because Bombard on some occasion within a few weeks before the event in question had been upon the premises of the employer. His conduct on that occasion was of sufficient importance to form the subject of a report by the superintendent to his superior, the manager of the factory. In view of these circumstances, the employee was given a special direction respecting Bombard. His duty was defined in this particular. He was to be ordered out, and the police were to be summoned if he did not go. The liability to whatever personal injury might be likely to arise in dealing with such a person was, therefore, within the contemplation of the employer and employee in establishing the boundaries of the latter's duty. That became a risk of the employment.

Under our workmen's compensation act it is not required that the injury be also an accident, differing in this respect from the English act and being more liberal to the employee. But even under the English act, in the present case, the dependent would be awarded compensation."

In *McNicol et al., v. Emp. Lia. Ins. Corp. Ltd.*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306, 4 N. C. C. A.

522, a workman was assaulted and killed by a drunken and frenzied fellow workman, who was permitted to continue at work although the employer knew that he was intoxicated and quarrelsome. It was held that his injuries arose "out of" and "in the course of" his employment. The court said:

"The first question is whether the deceased received an 'injury arising out of and in the course of his employment,' within the meaning of those words in part 2, section 1 of the act. In order that there may be recovery the injury must both arise out of and also be received in the course of the employment. Neither alone is enough.

It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which can not fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event

it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

The definition formulated above, when referred to the facts of these cases, reaches results in accord with their conclusions. Applying it to the facts of the present case, it seems plain that the injury of the deceased arose 'out of and in the course of his employment.' The findings of the industrial accident board in substance are that Stuart McNicol, while in the performance of his duty at the Hoo-sac Tunnel Docks as a checker in the employ of a firm of importers, was injured and died as a result of 'blows or kicks administered to him by . . . [Timothy] McCarthy,' who was in 'an intoxicated frenzy of passion.' McCarthy was a fellow workman who 'was in the habit of drinking to intoxication, and when intoxicated, was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employees, all of which was known to the superintendent Matthews,' who knowingly permitted him in such condition to continue at work during the day of the fatality—which occurred in the afternoon. The injury came while the deceased was doing the work for which he was hired. It was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition were well known to the foreman of the employer. A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion."

In *Western Indemnity Co. v. Pillsbury et al.*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1, L. Rudder proceeded against his employer, the Ocean Shore Railroad Co., and its insurer, the Western Indemnity Co., for compensation under the California act of 1913, known as the Boynton Act. Compensation was awarded, and the insurer brought the case to the supreme court by means of a writ of certiorari.

Rudder was foreman of a crew of 15 or 20 section hands, mostly Greeks. According to the findings of the industrial accident commission Rudder, on the 12th of April, 1914, observed that one Pappas was not doing his work of shoveling properly, and took the shovel from the Greek and showed him how it should be done. The laborer continuing to work in an improper manner, the foreman told him to drop his shovel and get his time. This was not done, and when the foreman attempted to take the shovel away, the man struck him with the flat side of it. Rudder then said he would make him drop the shovel and stepped back to get a stick 5 or 6 feet long. The workman meantime picked up a stone, but on the approach of the foreman dropped this and again struck with the shovel, missing his mark, however. The foreman then inflicted a blow with the stick, which felled the man to his knees. The latter seized the foreman by the legs and threw him, and climbing upon him, for 15 minutes inflicted severe lacerations with his teeth upon the foreman's face, hands and arms, which resulted in blood poisoning and prolonged disability. There being conflicting evidence, the court accepted as true the findings of fact of the commission as above stated; it also held that the commission was not in error as a matter of law in holding that the occurrence was an accident, and one arising out of and in the course of Rudder's employment. As to this the court, said in part:

"The circumstance that the injury was the result of a willful or criminal assault by another does not exclude the possibility that the injury was caused by accident [citing authorities]. . . .

Under these and other authorities, it is clear that an injury caused by the attack of a third person may be accidental so far as the injured person is concerned. On the other issue, whether the injury occurred in the course of the employment of Rudder, it must also be held that the finding of the commission was sustained by sufficient evidence. The question, simply stated, is whether the injury

resulted from Rudder's undertaking to do something in the line of his duty, or whether it occurred as the result of his going outside the scope of his employment and entering upon a private quarrel for reasons of his own. The facts found justify the inference that Rudder was hurt in an altercation which grew out of his justifiable efforts to maintain his authority as foreman and to protect the property of his employer intrusted to his care."

In Nebraska it was held that if an employee is assaulted either in anger or in play and sustains an injury it does not arise out of the employment, and he is not entitled to compensation. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509, L. R. A. 1916D 970.

For notes concerning assault as arising out of and in the course of employment, see L. R. A. 1916A 309-310, 64, 239; 6 N. C. C. A. 1010-1030, 11 N. C. C. A. 235-254.

§ 114. Injury to Eyes.

Injuries to the eyes must, like all others, be shown to have arisen both out of and in the course of employment. The injury to the eye must be shown to be clearly traceable to the accident out of which it grows; and if something other than the accident was the proximate cause of the injury to the eye the resultant disability is not within the scope of the act.

In *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A 323, McCoy got some steel filings in his eye while working at a machine. He rubbed the eye which became infected and later caused its loss. The medical testimony was that the eye was lost through gonorrheal infection. The court said: "In the instant case it is not reasonable to say that he would not have rubbed his eye if the steel had not lodged there. He might not have rubbed his eye, it is true; but it is just as reasonable to suppose that he might have had occasion to rub his eye without this particular inciting cause. By the medical testimony it conclusively appears that the infection could have taken place if the steel had not been there. It must be said from

this record, that the loss of the eye was directly and immediately due to the infection caused by the gonorrhea, which it can not be claimed is a risk incident to the employment. We are of the opinion that the facts are not capable of supporting the inference, that the injury arose out of and in the course of the employment."

The Wisconsin court in *Voelz v. Industrial Commission*, 161 Wis. 240, 152 N. W. 830, L. R. A. 1916A (note), 326, under similar facts came to the same conclusion. This position is also supported by *Bellamy v. Humphries* (Eng.), 6 B. W. C. C. 53. However, if the particles come into the eye while the workman is performing his regular duties the mere fact that the injury to the eye is aggravated by the fact that the injured man rubbed it does not defeat compensation. *Adams v. Thompson*, 5 B. W. C. C. 19, 6 N. C. C. A. 883 (note), L. R. A. 1916A 326 (note). For further discussion of cases in point, see L. R. A. 1916A 326 (note), 6 N. C. C. A. 880 (note).

§ 115. Going to Assistance or Rescue of Fellow Employee.

In *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475, Peter Dragovich brought proceedings for compensation for the death of Frank M. Markusic, which occurred while the latter was in the employ of the company named. Judgment was awarded in the sum of \$3,500 in the circuit court of Cook County, on an appeal by the employer from the report of the board of arbitration.

It appeared that the employee, in running to aid another employee who had fallen through an opening in the floor into hot water, and who shouted for help in Croatian, the native language of both, had himself fallen into the hole. The opening could not be seen on account of steam arising from it. The other employee was rescued by others about the same time that Markusic fell in. The latter died two days later from the effects of the scalding. The court held that the injury arose out of and in the course of employment, and affirmed the award. Judge Carter, who de-

livered the opinion, referring to the phrase "arising out of and in the course of employment," said:

"This provision of the statute has never been construed by this court, but somewhat similar acts have been construed by the courts in other jurisdictions. Under these authorities it is clear that it is the duty of an employer to save the lives of his employees, if possible, when they are in danger while in his employment, and therefore it is the duty of a workman in his employ, when occasion presents itself, to do what he can to save the lives of his fellow employees when all are at the time working in the line of their employment. Any other rule of law would be not only inhuman, but unreasonable and uneconomical, and would, in the end, result in financial loss to employers on account of injuries to their employees. From every point of view it was the duty of the deceased, as a fellow employee, in the line of his duty to his employer, to attempt to save the life of his fellow employee under the circumstances here shown. That he failed in his attempt does not, in the slightest degree, change the legal situation."

In *Mihaica v. Mlagenovich and Gillespie*, 1 Cal. Ind. Acc. Comm. Dec. (1914) 174, 10 N. C. C. A. (note) 478, there was a cave-in on some sewer work. Many of the employees including Mihaica were warned of the danger in time to escape but several were caught. In spite of the danger Mihaica went back to the assistance of those in the ditch and was killed. The defense of willful misconduct was made but was not considered by the commission which said: "The deceased was the only one of the employees who responded to the call of his fellow workmen for help and he lost his life in the effort to effect a rescue. Such conduct is not misconduct much less willful misconduct. The action of the deceased was humane and wholly commendable. Even though he deliberately exposed himself to the danger of injury and death his action can not be said to be willful in the sense of being stubborn, perverse, or as evidencing a state of mind opposed to the orders or

instructions given him, or as opposed to the action that reasonably should have been taken by him, both as fellow employee and in his official capacity as assistant foreman."

In *Menzies v. McQuibban*, 2 F. 732, 37 Sc. L. R. 526, 10 N. C. C. A. (note), 480, a laborer went to the assistance of a machinist who was having difficulty in adjusting a belt. The machinery was in motion. While acting as directed by the machinist the laborer was caught in the belt and received fatal injuries. The court said: "The words 'arising out of and in the course of employment' appear to me to be sufficient to include something which occurs while the workman is in his master's employment and on his master's work, although he is doing something in the interest of his master beyond the scope of what he was employed to do. The act does not say 'when doing the work he was employed to perform,' and it is a fair inference that if it had been intended to limit the right to compensation to such accidents different language would have been used from that which occurs in the act. It must be assumed therefore, that the legislature used language of wider scope to include cases where a workman intervenes to do something useful or helpful to his master, although outside the special duties which he is employed to perform."

For note on acts performed in emergencies as being within the sphere of employment under the compensation laws, see 10 N. C. C. A. 475-493.

§ 116. Acts Furthering the Master's Business or Protecting His Property.

In *State ex rel Duluth Brewing & Malting Co. v. District Court*, 129 Minn. 176, 151 N. W. 912, the question presented was as to whether the injury was one arising out of, as well as in, the course of his employment, and the supreme court decided that it was such, affirming the judgment below in the employee's favor.

The employee was foreman's helper, and had varied duties among which was that of replacing the electric light

bulbs in the bottling room when defective. These were covered with wire screens to prevent breakage, and each was locked, the foreman carrying the key, a simple three-cornered contrivance. On April 9, 1914, De Cook was handed by another workman what was apparently an empty cartridge shell of unusual length. It occurred to him that this could easily be made into a key, and save the time necessary to hunt up the foreman and carry the key back and forth when the light bulbs had to be replaced. He attempted to do this, using a hammer, and it proved that the article was an unexploded dynamite cap, which exploded, a portion piercing his right eye and destroying the sight. Judge Holt, in delivering the opinion, from which one judge dissented, spoke in part as follows:

"The trial court evidently took the view that De Cook in good faith believed he was furthering his master's business and performing an act which he might reasonably be expected to do when he undertook to supply himself with a key. He had never been told that the light bulbs were to be under lock as to him who was charged with the duty of seeing that the broken and defective ones were replaced. When a servant undertakes in the course of his employment, during the proper hours therefor, and in the proper place, to do something in furtherance of his master's business, and meets with accidental injury therein, the trial court's finding that the accident arose out of and in the course of employment should not be disturbed, unless it is clear to us that the ordinary servant in the same situation, would have no reasonable justification for believing that what he undertook to do when injured was within the scope of his implied duties. If another servant duly engaged in the master's work had had his sight destroyed, instead of De Cook, in this accident, the thought would have been almost irresistible that this law was meant to cover such injury. But, upon the facts in this case, we doubt whether De Cook should occupy a less favorable position. If the attempt to make a key was reasonably within the scope of his

employment, the fact that, from ignorance or error of judgment, he made use of dangerous material, not provided by the master, should not necessarily exclude the conclusion that the injury arose out of the employment. The term can not be restricted to injuries caused from anticipated risks of the service, if the law is to be of the benefit intended."

A night watchman was killed in a shooting affray with deputy sheriffs, believing them to be escaping bank robbers. He was working for a construction company and was not going to protect his employer's property. It was held that the injury did not arise out of the employment, within the meaning of the Massachusetts Act. *In re Harbroe* 111 N. E. 709, 223 Mass. 139.

Charlotte Hendricks proceeded under the workmen's compensation act for the death of Richard Hendricks, who had been a helper on a truck belonging to the firm named. The operation of a truck on a highway is defined in the law as a hazardous employment. It was held that this included the work of the helper in loading and unloading, watching and protecting the goods, etc.

The employee had ordered some boys to get off the rear of the wagon, and when they did not obey, he jumped from it to drive them away, fell and was killed. It was held that the work of protecting the employer's goods and interests was a duty arising out of and in the course of his employment, and that the fact that he may have been impulsive and imprudent made no difference. An award in favor of the claimant was therefore affirmed. *Hendricks v. Seeman Bros.*, 170 App. Div. 133, 155 N. Y. Supp. 638.

A carpenter was working for his brother who owned a piece of property on which he was building, and also a lot next to it. He instructed his brother not to allow any building material not intended for him to be deposited on this vacant lot. A teamster attempted to do this and the employee engaged him in a fight and drove him off. The teamster came back the next day with some con-

federates. The employee's brother was present and himself engaged the teamster in a fight. His brother voluntarily came out of the house and held off the confederates while his brother was fighting. One of those he was holding off threw a piece of iron which struck him in the eye. It was held that there was no connection between this voluntary act and the protection of his master's property, as his master on this second occasion was there in person and was protecting it. It was held that this was not an accident arising out of and in the course of his employment, under the Michigan Act. *Clark v. Clark*, 155 N. W. 507 (Mich.)

§ 117. Disobedience of Positive Instructions or Enforced Rules.

It has been held quite generally that when an employee deliberately disobeys positive instructions or enforced rules, made to reduce the natural hazards of the business, he thereby takes himself "out of" his employment. In *Smith v. Corson*, — N. J. Law—, 93 Atl. 112, Smith had been employed as a carpenter, and was killed on the 21st day of April, 1913, by a fall from a board laid across a scaffold. The trial judge found as facts that the deceased was not a strong, healthy man, was employed at less pay than the regular carpenters, and was expressly told by his employer not to go upon the scaffolds nor do any climbing; also other facts which might indicate that at the time of the accident he was not actually working. This judge nevertheless found that the accident was one arising out of and in the course of employment. The supreme court reversed the judgment in favor of the petitioner, saying in part:

"This latter finding [that the accident arose out of and in course of employment] can not be reconciled with the other facts found by the trial judge, and is expressly gain-said by his finding of fact that the decedent was told by his employer 'to keep off scaffolds and not to do any climbing.' His mishap and death were directly due to his own disre-

gard of his master's express orders. He was, on the scaffold, not in the course of his employment but in direct violation of it, and therefore it can not be said that the injuries which caused his death arose out of his employment."

In *Reimers v. Proctor Publishing Co.*, 85 N. J. Law 441, 89 Atl. 931, 4 N. C. C. A. 738, Reimers had been injured while using an automobile in distributing newspapers, the testimony showing that he had been expressly forbidden to use the same. The court said:

"The principal question in the case for us is whether there was evidence justifying an inference that the death was by accident arising out of and in the course of the employment. There was evidence justifying an inference that the decedent was employed by the defendant as a general utility man, and that among his duties was the distribution of newspapers. He had at one time used an automobile of the defendant, and had met with an accident which damaged the machine. The defendant then borrowed an automobile, and its president and one of his sons, who was in its employ, both forbade decedent to use the car. Nevertheless he used it frequently to distribute the newspapers. There is no evidence that anyone except the president had authority to authorize its use; but the use was so frequent and so public that, if there was nothing more in the case, the trial judge would have been justified in finding that the decedent was authorized to use it notwithstanding the prohibition. The difficulty is that both the president and his son testified that the decedent had been told not to use the car on the day the present accident happened. The son in particular told him, just before he went out, to let the car alone. There is no conflicting evidence on this point, and, if these witnesses are to be believed, the decedent took the car on the occasion when the accident happened in disobedience of express orders just received. If there was authority to use it before, there was a revocation."

A newspaper company had a rule prohibiting em-

ployees from going on the roof for fresh air. The rule was not enforced and an employee fell from the roof and was killed. It was held that the injury occurred in the course of employment. In *re Von Ette* 111 N. E. 696, 223 Mass. 56.

For note on disobedience of rules or orders see 8 N. C. C. A. 889-905; 12 N. C. C. A. 469-497.

§ 118. Injury Developing During Treatment As One In Course of Employment.

In *Newcomb v. Albertson* 85 N. J. Law 435, 89 Atl. 928, William E. Albertson entered a petition against Leverett Newcomb under the workmen's compensation act. Judgment was rendered for the petitioner in the court of common pleas of Cumberland County, and the case was taken up on certiorari, when the judgment of the lower court was affirmed.

Albertson was employed as a chauffeur and sustained a fracture of the arm because of the crank of the automobile "back-firing." While under treatment in the hospital, where he went with the acquiescence of the employer, an abscess of the thumb developed, caused by an unpadded splint. Ankylosis of the thumb followed, and this in turn caused injury to the first two fingers. In deciding that these injuries arose in the course of the employment, Judge Swayze, who delivered the opinion of the court, said:

"Section 11 of the workmen's compensation act (P. L., p. 136) provides for compensation for personal injuries to an employee by accident arising out of and in the course of his employment. The defendant expressly confines his argument to the award of compensation for the injury to the thumb and two fingers. The only question for us is whether those injuries were due to the accident. The question is not, strictly speaking, whether the accident was the proximate cause of the ankylosis of the thumb, or whether the infection was the natural result of the accident."

Clover v. Hughes 3 B. W. C. C. 275 was then quoted, in which it was said:

"It seems to me enough if it appears that the employment is one of the contributing causes without which the accident which actually happened would not have happened, and if the accident is one of the contributing causes without which the injury which actually followed would not have followed."

Continuing, the court said:

"In the present case it is said that the chain of causation is broken because the infection was due to the failure of the physician to take proper precautions. There is no finding to that effect, and the evidence is not before us. We can not assume that the infection could be caused only by the negligence of the physician, and it is therefore unnecessary to decide whether such negligence would amount to such a break in the chain of causation that the employer would not be liable. We think that the trial judge was right in finding that the injury in fact resulted from the accident and in holding the employer liable."

§ 119. Employee Warming Himself Between Cars In Leisure Time.

In *Northwestern Iron Co v. Industrial Comm.* 160 Wis. 633, 152 N. W. 416, the facts were: The company manufactures iron briquettes, and these are run out in small dump cars into the yard, where it was the duty of the injured employee to dump the cars, move them onto a return track, and pick up any briquettes which had fallen off the cars. A car usually came out every 15 minutes, and the men had about 5 minutes' leisure between trips. The injury occurred at about half past ten on a cold night, and the employee was caught between two cars, while either picking up briquettes or warming himself by the car of heated briquettes which had last come out. The court said:

"If we credit the claimant's own story, there is no question about his right to compensation, because he was picking up briquettes at the time the second car came from the kiln and struck him. The commission, however, did not decide whether the claimant or Vignovich told the truth,

but held that in either case compensation must be paid; hence we must consider the case on the assumption that the story told by Vignovich is true. This story is in effect that, the night being cold, they blocked a car as it came out and sat down on the track in front of it to get warm from the heat of the briquettes, which were just out of the kiln; that in a few minutes he left claimant lying on the track in front of the car and went over to his own track 25 feet away, and some minutes later heard claimant holler, and came over and found him caught between the cars. The only reasonable inference from this testimony seems to be that the claimant, instead of at once proceeding to pick up the fallen briquettes, dump the car, and thus prepare to receive the next car, blocked the car, and proceeded to sit down or lie down in front of it in order to get warm, and was there caught by the next car, either while he was engaged in getting warm or while he was picking up briquettes after he had got warm. This would be good ground upon which to find the claimant negligent, but negligence does not prevent compensation.

Clearly this testimony does not show that the injury was intentionally self-inflicted; hence the only question is, does it show that at the time of the accident the claimant was not performing service growing out of or incidental to his employment? We think not. The man's duties involved periods of leisure during which apparently he was expected to kill time as best he might, with no specific direction as to what he should do or where he should wait; the night was cold, and he put off dumping the car until he could warm himself from its heated contents; to say that in so doing he had left the master's employment, was pursuing his own private purposes, and doing something foreign to the work he was employed to do is illogical to a degree. To protect himself from undue and unnecessary exposure to the cold was a duty he owed his master as well as himself, and it does not follow that he left his master's

employment because he negligently allowed the second car to run into him while he was warming himself."

§ 120. Workman Seeking Shelter From Storm.

In *Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620, Ralph R. Moore was awarded compensation against the railroad company named for injuries sustained in its employ, and an appeal was taken. The company owned and operated a railroad between points in New Jersey and New York, and telegraph and telephone lines along its route. The employee was assisting in erecting a new line of poles and wire at a place where it was desired to change the location of them. On July 23, 1914, a violent rainstorm arose during working hours. Several of the men went under a tree until it no longer afforded protection, when some of them went into a paper mill; but there being no more room in it, Moore, with others, went under cars standing on a switch, about one-fourth mile from where they had been working. No shelter was furnished by the company for such occasions, nor was there any rule of the company in regard to the matter; but it was customary for the men to find shelter where they could, and no deductions were made from their wages for time lost on other occasions nor on this one.

While the employee was sitting under a car, an engine moved the cars. He was struck upon the forehead by a projection of the car and fell over, and both legs were cut off.

In discussing the question whether the occurrence was an accident arising out of and in the course of employment, the English and American cases were gone into quite fully, and the court, which concluded that this was an accident, and within the language of the statute, and which affirmed the award, said in part:

"That the injury was sustained by claimant during the course—that is the period, or time, or extent—of the employment is not seriously disputed by the defendant; but the defendant strenuously contends that the injury did not

arise out of the employment. It was not only customary that the claimant should seek shelter from the storm, but doing so was not a remote, but a necessary, and unquestionably frequent, incident of his employment during the summer months. Had he taken shelter in the paper mill, and the roof fallen in, or the floor given way, and he been accidentally injured, he would have been entitled to the benefit of the compensation law. Whether a place in a stone crusher being operated by machinery, or under a car standing upon a switch, was the safer place, does not appear. The four linemen chose places under the cars. However, assuming that the place under the car was the more dangerous, the fact that the plaintiff's judgment led him to choose it, and that he was injured there, does not bar him from the operation of the act. Contributory negligence furnishes no ground of defense. The compensation law says that the employer shall provide compensation 'without regard to fault as a cause of such injury.' The risk of accidental injury was incidental to the claimant seeking and obtaining shelter, and to his employment, and was fairly within the contemplation of both employer and employee. The act of seeking and obtaining shelter arose out of—that is, was within the scope or the sphere of—his employment, and was a necessary adjunct and an incident to his engaging in and continuing such employment."

§ 121. Truck Driver Putting Up a Horse.

In *Smith v. Price et al.* 168 App. Div. 421, 153 N. Y. Supp 221, the deceased was employed in driving a truck at Cortland, N. Y., and was putting up his horse in the stall when it jumped and squeezed him against the side of the stall, causing his death. The court held that this part of the duty was included in the employment designated in the law under group 41, saying in part:

"The benefit of the act is not limited to the actual time that the horse is moving or that the employee is upon the truck. It covers every injury or death received in the course of the employment. The loading and unloading of his

truck, hitching and unhitching his horse to the truck, feeding and caring for his horse, are a part of the employment of operating the truck, and are fairly within the provisions of the law."

§ 122. Cleaning a Motorcycle Used In Employer's Business.

In *Kingsley v. Donovan et al.* 169 App. Div. 828, 155 N. Y. Supp. 801, Harry H. Kingsley proceeded against his employer, William F. Donovan, and the insurer, for compensation for the loss of the distal phalanges of the first and second fingers of his right hand. While cleaning the clutch of his motorcycle the fingers were caught in the chain guard, and portions of them taken off. The motorcycle was owned by the employee, who used it in riding to and from his work, and occasionally in the business of the employer. The court, with one judge dissenting, affirmed an award of the compensation commission, Judge Kellogg saying:

"The appellants contend that the accident was not one arising out of and in the course of employment. There is some evidence tending to prove those facts, and under the workmen's compensation law the decision of the commission is conclusive upon the facts. Clearly, if the bicycle was only used for the convenience of the claimant in bringing him to and from his place of work, the case would not be within the act. But the evidence shows that from time to time it was used in the business of going to and from the work off the premises, and that at other times, when it had been cared for during working hours, no question had been raised by the employer. It could not be used in the business unless kept in proper condition. The fact that the workman was engaged upon it near the place of business and during business hours, and that it was frequently used in the business, do not make the findings of the commission unreasonable."

§ 123. General Illustrations Concerning Injuries Arising Out of and In the Course of Employment.

Whether or not an injury arises out of and in the course of employment is of primary importance, because this fact does not necessarily follow when the relation of employer and employee has been established. The field covered by the decisions on this subject is so broad that it is impossible in a work of this sort to treat every phase of it exhaustively. Under this heading are gathered some interesting decisions involving in a general way the question whether the accident arose "out of and in the course of the employment."

In *Nisbet v. Rayne & Burn* (Eng.), 2 K. B. 689, 3 N. C. C. A. 268, it was held that the murder of a cashier while traveling on a railroad train carrying the pay roll of his employers was an accident arising out of employment.

In *McLauchlan v. Anderson*, 48 Scot. L. R. 349, 4 B. W. C. C. 376, a driver let his pipe fall and in trying to catch it, fell from his seat and under the wheels of the wagon he was driving. The accident was held to have arisen out of employment and in the course thereof.

Likewise the drowning of a servant in the attempt to save the life of a fellow servant. *Matthews v. Bedworth*, 1 W. C. C. 124 (Eng.). For note on drowning as an accident arising out of and in the course of employment, see 12 N. C. C. A. 64-83.

An employee after completing his day's work and while still on his employer's premises was injured while going from the locality where he was doing his work to the office of the paymaster to obtain his pay, the traversing of that portion of the premises on which the injury occurred not being forbidden by the rules or directions of the employer and the injury not being purposely inflicted, it was held that the injury was sustained in the course of the employment and the injured employee was entitled to compensation. *Re R. B. Phillips Claim No. 3514*, Ohio Indus. Acc. Bd., May 5th, 1913. 7 N. C. C. A. (note), 429.

A miner fell while passing a chute in the mine. A few

minutes later he was demonstrating to a fellow workman and while so demonstrating he fell again. It was contended that the second fall caused the injury and, that, therefore, it was not received in the course of employment. Compensation was awarded. *Mileta v. Newport Mining Co., Mich. Indus. Acc. Bd., July, 1913.* For note on injuries caused by the employee's gross carelessness or foolhardiness as accidents arising out of and in the course of employment see 12 N. C. C. A. 1032-1037.

The duties of an insurance agent required him to go from door to door making collections of premiums, while doing this he fell down a stairway and was injured. It was held that the injury arose out of his employment. *Refuge Assurance Co. v. Millar, 49 Scot. L. R. 67, 5 B. W. C. C. 522.*

Where a miner had been instructed not to fire a blast, but did so anyway, it was held that the injury did not arise out of employment. *Kerr v. William Baird & Co., Ltd., 48 Scot. L. R. 646, 4 B. W. C. C. 397.*

Likewise where a miner continued work for an hour after he was warned that blasting was to commence. *Traynor v. Addie & Sons, 48 Scot. L. R. 820, 4 B. W. C. C. 357.*

Also when a miner was injured while riding upon a carriage upon which he had been forbidden to ride. *Kane v. Merry & Cunningham, Ltd., 48 Scot. L. R. 430, 4 B. W. C. C. 379.*

Injuries received by a driver while delivering material to the home of a fellow employee as an accommodation to him, did not arise out of employment nor in the course of it. *Werner v. Rising Sun Brewing Co., 37 N. J. L. J. 364, 9 N. C. C. A. (note), 648.* For note on accidents to employees engaged in operating vehicles as arising out of and in the course of employment, see 12 N. C. C. A. 174-199.

The same was held where an employee, while delivering hardware, stopped to assist in getting up a fallen horse which fell on him and broke the employee's leg. In *re Verkamp, 1 Ohio Ind. Comm. Bul. 123, 9 N. C. C. A. (note), 649,*

A laborer in a sawmill was told several times to throw fuel into a furnace on the side away from a revolving saw. He chose to act contrary to instructions and was injured by coming in contact with the saw. It was held that this injury did not arise out of employment. *Schelf v. Kishpaugh*, 37 N. J. L. J. 173, 9 N. C. C. A. (note) 652.

It was also held where a workman employed to do work by hand tried to rig up a time saving device by throwing a rope over a revolving shaft. *Plumb v. Cobden Flour Mills Co.*, 6 B. W. C. C. 245, 9 N. C. C. A. (note), 655. For note on injury to employee during the performance of an act for his own purpose or convenience as resulting from an accident arising out of and in the course of employment, see 12 N. C. C. A. 891-907.

Where a servant drank a poisonous fluid while at work, believing he was drinking water, the injuries received were held to have arisen out of and in the course of the employment, within the meaning of the West Virginia Act. *Archibald v. Ott* 87 S. E. 791.

For further examples of cases having to do with accidents arising out of and in the course of employment, see note L. R. A. 1916A (*American Cases*), 232-242 (*English Cases*), 40-72. See also 5 N. C. C. A. (note), 985-991, 9 N. C. C. A. (note), 647-665, and cross-references.

For note on whether or not accidents to employees while not actively employed, but subject to call arose out of and in the course of employment, see 12 N. C. C. A. 243-253.

In the following recent cases it was held that the injury arose out of and in the course of the employment within the act:

In re Fisher, 108 N. E. 361, 220 Mass. 581; *Voorhees v. Smith-Schoonmaker Co.*, 92 Atl. 280, 86 N. J. L. 500, 7 N. C. C. A. 646; *State v. District Court of Meeker Co.*, 150 N. W. 623, 128 Minn. 221; *State v. District Court of St. Louis Co.*, 151 N. W. 912 (Minn.), 129 Minn. 176; *Musik v. Erie R. Co.* 86 N. J. L. 695, 92 Atl. 1087; *Northwestern Iron Co. v. Ind. Comm.* 152 N. W. 416, 160 Wis. 633; *Fitzgerald v.*

Lozier Motor Co., 154 N. W. 67, 187 Mich. 660; State v. District Court of Ramsey Co., 153 N. W. 119, 129 Minn. 502, L. R. A. 1916A 344, 9 N. C. C. A. 129; Jillson v. Ross, 94 A. 717 (R. I.); In re Savage, 110 N. E. 283, 222 Mass. 205; Pierce v. Boyer-Van Kuran Lumber & Coal Co., 156 N. W. 509, 99 Neb. 321; De Fazio's Estate v. Goldschmidt Detinning Co., 95 A. 549, affirming, 88 Atl. 705, 4 N. C. C. A. 716; Rist v. Larkin & Sangster, 156 N. Y. S. 875, 171 App. Div. 71; Federal Rubber Mfg. Co. v. Havolic, 156 N. W. 143, 162 Wis. 341; In re Doherty, 109 N. E. 887, 222 Mass. 98; In re Von Ette, 111 N. E. 697, 223 Mass. 56; Cline v. Studebaker Corp'n., 155 N. W. 519, L. R. A. 1916, C. 1139 (Mich.); Kingsley v. Donovan, 155 N. Y. S. 801, 169 App. Div. 828.

§ 124. Burden of Proof.

In *Hills v. Blair et al.*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409, the court stated the general rule as follows: "It is well settled that the burden rests upon the one claiming compensation to show by competent testimony, direct or circumstantial, not only the fact of an injury, but that it occurred in connection with the alleged employment, and both arose out of and in the course of the service at which the party was employed."

In *McCoy v. Michigan Screw Co.*, 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A, 323, the court said: "The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose 'out of and in the course of employment' rests upon the claimant. *Bryant v. Fissel*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585. *Ruegg on Workmen's Compensation*, p. 343, says: 'If an inference favorable to the applicant can only be arrived at by a guess, the applicant fails. The same thing happens when two or more inferences equally consistent with the facts arise from them.'"

It is well established that the burden is on the one claiming compensation to establish by sufficient evidence that an accident or injury both arose "out of" and "in the

course of" employment. In *re Von Ette*, 223 Mass. 56, 111 N. E. 697; *Englebreetsen v. Ind. Acc. Comm.* 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545; *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; In *re Savage*, 222 Mass. 205, 110 N. E. 283.

In the last named case the court said:

"Under the workmen's compensation act, the findings of the industrial accident board are equivalent to the verdict of a jury or the findings of a judge and are not to be set aside if there is any evidence to support them. . . . The industrial accident board has found that: 'The employee, Joseph W. Savage, did not receive a personal injury arising out of and in the course of his employment; that his death occurred by reason of his unexplained absence from the car which he was engaged in unloading; that his presence on the railroad track was unnecessary under the circumstances and subjected him to a needless risk of injury from moving railroad trains; and that, therefore, the widow, Mrs. Eva Savage, is not entitled to compensation under the statute.'

The plaintiff is not entitled to recover under this statute, unless the injury arose out of and in the course of her husband's employment; and to establish these facts the burden of proof rests upon her. It is not enough 'to show a state of facts which is equally consistent with no right of compensation as it is with such right.' There being no evidence to show that the fatality was caused by her husband's employment or that it occurred while he was engaged therein, she can not recover."

§ 125. May Be Established By Circumstantial Evidence.

The case of *Muzik v. Erie R. R. Co.*, 85 N. J. Law 131, 88 Atl. 248, affirmed, 86 N. J. Law 695, 92 Atl. 1087, Ann. Cas. 1916A 140, rested on the question as to whether the fact that the death of the employee arose in the course of his employment must be proved by direct evidence, or would be inferred from the circumstances which existed in the case. The court said:

"The first point made by the defendant is that there is no evidence that Muzik's death was caused by an accident in the course of his employment. It is true that no direct evidence of these facts was produced. The man was found after the train had gone out, some 3 or 4 feet from the railroad, lying with his feet toward the track, with an injury in his head, and died shortly; the case being one of a broken neck.

The Bergen County court of common pleas found that the deceased came to his death by accident, while in the railroad's employ, and in the course of it. I do not think that we can question this finding. The facts shown clearly indicate that the deceased was struck by the train after he had given the waybills, in pursuance of his duty, as such employee, to the train agent; and this, of course, would be while in the course of his employment."

A workman was found unconscious. It was held that the finding of the board that he came to his injuries through an accident in the course of his employment was justified. *Heileman Brewing Co. v. Shaw*, 154 N. W. 631, 161 Wis. 433.

CHAPTER IV

DISABILITY

Section.

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§ 126. In General.

The acts of the various States are generally very specific as to what constitutes disability, whether it be temporary or permanent. Most of them have, in addition, definite schedules of injuries for which certain periods of disability are thereby determined. It is impracticable to attempt to compare the provisions of the various acts on this subject. To do so would be confusing rather than helpful. The only

absolute guide as to what constitutes disability is the wording of the act in question. However, the decisions of the various States may be of considerable assistance in arriving at the meaning of the act of any particular State. What is said in this chapter concerning disability is said with the above considerations in mind.

§ 127. Waiting Period.

Practically every act passed has provided that compensation should not begin until the expiration of a certain period. In almost every case two weeks has been thought to be the proper "waiting period." Except for the medical attention which begins immediately after the injury the waiting period is generally not compensated for, but in some States, as in Arizona, Michigan, Nevada and Wisconsin, if the disability continues for a certain number of weeks, compensation dates back to the day of the injury. In Illinois and Minnesota the waiting period does not apply in cases of total disability and in Maryland it is then reduced from two weeks to one week. Oregon and Washington have no waiting periods. The purpose of this is to make it unattractive for workmen to feign injuries or to intentionally injure themselves in order to collect compensation. While such actions are unusual, there are always some workmen of a lower order who would take advantage of the employer, were it not for a provision like this which removes the temptation.

Where the employer and employee have elected to come within the provisions of the compensation law, that law is exclusive of all other remedies. *McRoberts v. National Zinc Co.*, 93 Kan. 364, 144 Pac. 247. Therefore, no claim of any kind can be made for injuries which do not disable the workman for a longer time than the waiting period unless the act specifically permits such a claim.

§ 128. Kinds of Disability Defined.

There are four kinds of disability under the acts generally, for which compensation is payable, (1) temporary

total, (2) permanent total, (3) temporary partial, (4) permanent partial.

1. Temporary total disability is that which incapacitates one for any work for a limited time after which regular work can be resumed either with no further disability or possibly with a degree of temporary partial or permanent partial disability.

2. Permanent total disability is that which, in theory, completely incapacitates one from all work for all time, either actually or by direct statutory provision.

3. Temporary partial disability is that which partly incapacitates one from work for a limited time after which regular work can be resumed. This disability may be original or it may follow a period of temporary total disability, or it may be followed by any of the other three degrees of disability.

4. Permanent partial disability is that which, in theory, partly incapacitates one from full work for all time and may follow a period of temporary total or temporary partial disability.

§ 129. Factors In Earning Ability.

In Harper's *Workmen's Compensation*, p. 161, § 144, the author says: "It has been well stated that ability to earn wages is mainly dependent upon the following factors: (1) Unimpaired functional power of bodily organs. (2) Technical knowledge and skill required to carry on the vocation. (3) The ability of the individual to compete in the labor market. (Magnus & Wurdeman, *Visual Economics*, p. 26.) Whether incapacity has resulted from any accident, by reason of the disturbance of any of these three factors, is entirely a question of fact, except, of course in those cases of partial permanent incapacity included in the schedule of specific injuries, in which cases incapacity is conclusively presumed. *Leeds & Liverpool Canal Co. v. Hesketh* (1910), 3 B. W. C. C. 303; *Furness v. Bennett* (1910), 3 B. W. C. C. 195; *Royman v. Fields* (1910), 102 L. T. 154, 3 B. W. C. C. 123; *Smith v. Colliery Co.* (1900),

2 W. C. C. 121; *Dowds v. Bennie* (1903), 5 F 268; *Price v. B. B. & Co.* (1907), 2 B. W. C. C. 337; *Wells v. Cardiff Steam Collieries Co.* (1909), 3 B. W. C. C. 104; *Roberts v. Benham* (1910), 3 B. W. C. C. 430; *Anderson v. Darngavil* (1910), S. C. 456; *Cunningham v. McNaughten & Sinclair* (1910), S. C. 980, 3 B. W. C. C. 577; *O'Neil v. Ropner & Co.* (1908), 43 Ir. L. T. 2, 2 B. W. C. C. 334."

§ 130. A Nervous or Hysterical Condition As Disability.

In *Eaves v. Blaenclydach Colliery Co., Ltd.*, 2 B. W. C. C. 329, Lord Cozens Hardy said: "The effects of an accident are at least twofold: They may be merely muscular effects—they almost always must include muscular effects—and there may also be, and frequently are, effects which you may call mental, or nervous, or hysterical. I cannot, for the moment, think which is the proper word to use in respect to them. The effects of this second class as a rule, arise as directly from the accident which the workman suffered as the muscular effects do; and it seems to me entirely a fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, but the nervous or hysterical effects still remain."

§ 131. Temporary Total Disability.

This applies to all injuries of a minor and temporary character which result, for the time being, in an inability to perform any of the regular duties for a period longer than the waiting period. The great majority of claims under the acts are for this kind of disability.

It is always a question of fact whether or not temporary total disability exists in a given case. The temporary disability ceases to be total when it is established by the physical facts of the case or by competent medical testimony that the physical ability to earn usual wages has been again restored. It need not be completely restored, for temporary total disability may be followed by a degree of partial disability and while the injured man may for a time be unable to resume his usual work at usual wages he may be able to earn a part of his usual wages by doing

lighter work or work requiring less skill. *Utieres v. Otto*, 2 Cal. Ind. Acc. Comm. Dec. 652.

In *re Septimo*, 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906, an employee who received \$10 a week was taken back after an injury at \$9 a week. The court said: "While he was so employed, after his injuries, the mill, where he worked, was shut down for three and five-sevenths weeks, 'owing to slackening up of business.' During this time he received no wages. The question in controversy is whether he was entitled to compensation for the three and five-sevenths weeks when the mill was closed upon a total or partial incapacity for work." After stating that the findings of the commission could not be disturbed where there was any evidence to warrant them, the court continued: "The insurer contends that because the employee was employed after his injury and paid wages at the rate of \$9 a week, a finding of total incapacity for work during the time that the mill was closed was not warranted. We do not think that this contention can be maintained. While such employment was evidence that the employee was not wholly incapacitated for work, yet it was not conclusive. The committee of arbitration found that it was probable, considering his injured condition, that he would not have been able to obtain work or to earn anything elsewhere. The record shows that he was seriously disabled and crippled."

An employee attempted to lift a heavy cement block while in a sitting position. There was no external evidence of injury, but he was caused pain and was temporarily disabled from work. It was held that he suffered an accident within the meaning of the Wisconsin Act. *Bystrom Bros. v. Jacobson*, 155 N. W. 919, 162 Wis. 180.

It was held in California that the board had no power to allow compensation for additional disability due to the slipping of a broken bone, unless it was the natural result of the original break. *Pacific Coast Casualty Co. v. Pillsbury*, 153 Pac. 24, 171 Cal. 319.

§ 132. Inability to Procure Work.

The fact that a workman has been unable to procure any work on account of an injury, although he tried diligently, has been held to result in "total incapacity for work" in those jurisdictions where this phrase is used. There is little if any real difference between the meaning of those words and permanent total disability as generally used.

In *Sullivan v. American Mutual Liability Insurance Co.*, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A 378, 5 N. C. C. A. 735, Sullivan lost his right arm and after he was physically able to do work, he was unable to procure it. It was contended that his period of total disability ended when he was physically able to earn wages regardless of whether or not he had actually been able to obtain suitable employment. After citing the English cases establishing a similar ruling the court said: "In our opinion these decisions are correct in principle. The object of our statute was to give compensation for a total or partial loss of capacity to earn wages. *Gillen's Case*, 215 Mass. 96, 99, L. R. A. 1916A 371, 102 N. E. 346. If, as in this case, the injured employee by reason of his injury is unable in spite of diligent efforts to obtain employment, it would be an abuse of language to say that he was still able to earn money, that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work, if practically the labor market were not thus closed to him. He has become unable to earn anything; he has lost his capacity to work for wages and to support himself, not by reason of any change in market conditions, but because of a defect which is personal to himself and which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that because he could do some work if he could get it, he is not under any incapacity for work, although by reason of his injury he can obtain no opportunity to work." This decision is supported by the following: *Duprey's Case*, 219 Mass. 189, 106 N. E. 686; *Stickley's Case*, 219 Mass. 513,

107 N. E. 350; *Septimo's Case*, 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906; *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244. For further discussion, see also L. R. A. 1916A (note) 380-381; 5 N. C. C. A. (note) 735-741; 7 N. C. C. A. (note) 906-910.

§ 133. Temporary Partial Disability.

Temporary partial disability may be original or it may follow a period of temporary total, or be followed by any of the other three degrees of disability. If it is original, although the injured man may continue at some kind of work, less remunerative than his usual work, it is compensable, provided it continues after the waiting period.

Some of the acts provide specifically to the effect, that if an employee is injured but not totally or permanently disabled from work, he is entitled, after the waiting period, to a certain percentage of the difference between his earning power before and after the injury within the limits provided as to amount and time. See *Roberts v. Charles Wolff Packing Co.*, 95 Kan. 723, 149 Pac. 413, and L. R. A. 1916A (note) 377-378.

But if temporary partial follows a period of temporary total disability it is usually provided that credit must be given to the employer for the amount of compensation already paid and the number of weeks during which it has been paid, as against the maximum amount and number of weeks allowed by the act.

Whether or not temporary partial disability exists is a question of fact to be determined by all the circumstances of the case. *Gordan v. Evans*, 1 Cal. Ind. Acc. Comm. Dec. 94.

§ 134. Permanent Total Disability.

In practically all the States except Arizona, California, Indiana, Kansas and New Hampshire, certain definite injuries are set forth in the schedules of disability, and, when these injuries exist total disability is usually presumed, in the absence of direct proof to the contrary. These

schedules almost universally include the loss of both legs, both arms, or one arm and one foot and both eyes and often, in addition, complete paralysis of both arms or both legs or of one arm and one leg, and injuries resulting in incurable insanity or imbecility.

The amount of compensation for total disability and the duration of it vary considerably. In some States, of which California, Colorado, Illinois, New York, Ohio, Oregon, Washington and West Virginia are examples, compensation for total disability continues during life. But in almost all the other compensation States, there is a limitation as to the time for which it is to run or a maximum amount beyond which the employer is not liable, and often a limit both as to time and amount.

§ 135. Incapacity for Work.

Whether or not an injury totally incapacitates a man from performing or securing work is a question of fact which must be determined after hearing the facts and competent medical testimony. If a workman suffered an impairment of functional power that made it impossible for him to follow the trade at which he was skilled, that fact should be taken into consideration in arriving at the degree of permanent partial disability, but would not constitute total disability. But it is clear that the inability to perform any work because of injuries resulting from accident arising out of and in the course of employment would be total disability within the meaning of the acts. The burden of proving such a condition, outside of the functional impairments named in schedules where the acts have them, rests on the claimant.

For cases on "incapacity for work" see *Duprey v. Maryland Casualty Co.*, 219 Mass. 189, 106 N. E. 686; *Gillen's Case*, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A 371; *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244. For cases on "inability to secure work" as evidence of "incapacity for work," see in *re Sullivan*, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A 378, *Duprey v. Maryland Casualty Co. supra*.

§ 136. Loss of Second Eye Where First Was Lost Previously.

In *State ex rel Garwin v. District Court of Cass Co. et al.*, 129 Minn. 156, 151 N. W. 810, 8 N. C. C. A. 1052, John Garwin, who was totally blind in one eye, was injured while in the employ of J. Neil's Lumber Co., the sight of the other eye being destroyed. The trial court awarded him the amount designated by the statute for permanent partial disability consisting of loss of an eye. He appealed, contending that the award should be for permanent total disability, as he was now totally blind. The court affirmed the previous judgment, holding that section 15 of the act clearly indicates that in such cases the compensation is to be for partial disability only, and quoting that section as follows:

"If an employee receive an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury."

In *Weaver v. Maxwell Motor Co.* 186 Mich. 588, 152 N. W. 933, L. R. A. 1916B 1276, Charles Weaver, who had lost one eye several years before, lost the other by accident while in the employ of the company named. The question arose as to the construction of the act, whether he should be compensated as for total disability, or under the provision that for the loss of an eye the injured person should receive one-half his weekly wages for 100 weeks. The court decided that the latter provision would apply, and said:

"Since the case was submitted counsel for the claimants has called the attention of the court and opposing counsel to the case of *State ex rel. Garwin v. District Court et al (Minn.)*, 151 N. W. 910, which is a case on all fours as to the facts. It is not a precedent in the instant case,

however, because the Minnesota statute contains language not found in the Michigan statute, reading:

'If an employee receive an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury.'

And it was held the compensation should be based upon the permanent partial disability, and not, as claimed by the appellant, on the basis of permanent total disability.

It must be confessed that the provisions of the Michigan statute are so ambiguous as not to be free from doubt. All its provisions, however, should be given effect, if possible. The compensation fixed in section 9 must be based upon the fact that the total incapacity for work resulted from the injury. Section 10 deals with the partial incapacity for work resulting from the injury, and fixes the compensation, and then proceeds:

'For the loss of an eye fifty per centum,' etc. 'The loss . . . or both eyes . . . shall constitute total and permanent disability.'

In the instant case the loss of the first eye was a partial disability for which, if our workmen's compensation law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the result of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity can not be entirely attributed to the last accident. It follows that the compensa-

tion should be based upon partial incapacity; and it is so ordered."

An employee having lost one eye before entering the employment, lost another from an injury while at work. He was held, under the Mass. Act, entitled to compensation for "total incapacity for work." The court said: "The total capacity of this employee was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of a normal man. But that capacity, which was all he had has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury," In re Branconnier, 223 Mass. 273, 111 N. E. 792.

§ 137. Loss of Second Hand Where First Was Lost Previously.

In Schwab v. Emporium Forestry Co. 167 App. Div. 614, 153 N. Y. Supp. 234, Jacob Schwab made claim against his employer, and its insurer for compensation under the workmen's compensation act. His injury consisted of the loss of his right hand at the wrist, on July 6, 1914. His left hand had been amputated in 1892. The commission certified to the court the question whether the claimant was entitled to compensation for permanent total disability, or for loss of one hand. The court determined that he was entitled to an award for permanent total disability, and said:

"If a man has two hands, he is presumably a more efficient worker and can receive higher wages than if crippled by the loss of one hand. The method of payment of compensation for the loss of one hand is to allow the salary which the injured party was earning for 244 weeks. If the injured party had two hands and were earning \$20 a week, if he lost one hand he would recover \$4,880. Another workman having lost one hand before entering the employment would be receiving, say, \$10 a week for less efficient service. If that workman lost the second hand in the service, if the claim of the insurance carrier is right, he would recover for 244 weeks at \$10 a week, or \$2,440. So that for the

loss of the second hand, which had its double value on account of the previous loss of the first hand, under this system he would be entitled to recover only half as much as for the loss of the first hand. This anomalous result would indicate that the legislature could not so have intended. By subdivision 1 of section 15, the loss of both hands shall presumably constitute total disability. As compensation for that total disability, he is to receive 66 2-3 per cent of the average weekly wages that he is then earning. As the man with one hand is presumably earning less wages than a man with two hands, to allow for the loss of the second hand as a permanent disability, a percentage of the weekly wage that he was then earning would be in complete harmony with compensation to one who had lost both hands by the accident, who receives his 66 2-3 per cent upon the greater wages that he was earning at the time of the accident.

Moreover, this reasoning accords with the rule which seems to be laid down in subdivision 6 of section 15, which provides that the fact that an employee has suffered previous disability shall not preclude him from compensation for a later injury, 'but in determining compensation for the later injury, or both, his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury.' Cases are cited upon the attorney general's brief which indirectly lend support to his contention that the claimant has the right to recover as for a permanent disability. But the decision may well rest upon the logic of the situation, in view of the fact that the amount of compensation depends upon the weekly wage, and the weekly wage is influenced by his crippled condition at the time of the accident.

In answer to the question certified, we decide that the claimant is entitled to recover as for total disability."

An appeal from this judgment was taken to the court of appeals of the State.



138. Failing Health As Affecting Total Disability.

The fact that an injured employee was in failing health and would probably soon be totally incapacitated from work on account of his physical weakness, is not a bar to his claiming compensation for total disability where the injury was sufficient to produce total disability, regardless of his physical condition. *Duprey v. Maryland Casualty Co.*, 106 N. E. 686, 219 Mass. 189.

Under the California act when an aged workman received fractured ribs in an accident and recovered from these but on account of his advanced age could not recoup the strength to take up his duties again, it was held that he was entitled to compensation only for the time actually lost from his work as a result of the fractures but not to such further disability as was brought on by the natural physical breakdown due to age. Such disability was held not to be due to a natural hazard of the business. *Udell v. Wagner, Peterson & Wilson*, 2 Cal. Ind. Acc. Comm. Dec. 113, 11 N. C. C. A. (note) 58. See also, *In re Browning*, Ohio Ind. Comm. No. 68112, July 15, 1915, 11 N. C. C. A. (note) 56. See also *Clark v. George Taylor & Co.* (Eng.) 2 Sc. L. T. 145, 11 N. C. C. A. 54.

In *Bateman Mfg. Co. v. Smith*, 85 N. J. Law 409, 89 Atl. 979, 4 N. C. C. A. 588, Smith received an injury crushing his right leg. He was 73 years old and, on account of his age and the inability of the bones to knit, this accident caused permanent disability in his occupation as plumber, which required standing.

The judge of the court of common pleas of Camden County awarded compensation for total disability for 400 weeks. This award was reversed by the supreme court and compensation awarded for 175 weeks, the compensation specified for loss of a leg. In rendering this decision the court said that the award must be limited by the schedule contained in paragraph 11 of section 2 of the act and that the age or health of the employee, although causing an ac-

cident to have a different effect, does not affect the amount of compensation.

The case of *City of Milwaukee v. Ritzow* 158 Wis. 376, 149 N. W. 480, 7 N. C. C. A. 498, presents an interesting question under the Wisconsin act which provides that in case of the permanent injury of an employee who is over 55 years of age the compensation shall be reduced by 5 per cent, if over 60 years of age by 10 per cent, and if over 65 years of age by 15 per cent. Other subdivisions provide that, in case of the death of an injured employee, a sum equal to the compensation for permanent injury or disability shall be paid as benefits to the surviving dependents of the employee. In the present case the employee, a man 80 years of age, was killed in the course of his employment, and the industrial commission awarded his widow an amount equal to four times his last average annual earnings, which is the amount provided for permanent disability, without making any 15 per cent reduction. The circuit court of Dane County affirmed this award, and the city appealed to the supreme court. The latter held that the term "permanent injury" was used in the ordinary sense, and did not include injury resulting in death, in spite of the fact that the reason for the reduction in such cases might be stronger than in cases where the employee survives with permanent disability. The full award was therefore affirmed, two judges dissenting, the court saying that it was so easy for the legislature to specify if it had desired to reduce death benefits as well as those for permanent disability that its failure to do so inclined the court to the view that such was not its intention even though the "reason of the statute as to reduction of compensation applies stronger to the condition not included in its strict letter than to that which is."

§ 139. Disability for Particular Work Not Total.

In *Mellen Lumber Co. v. Industrial Comm.* 154 Wis. 114, 142 N. W. 187, L. R. A. 1916A 374, Ann. Cass. 1915B 997, the question involved was as to the degree of disability

suffered by a shingle sawyer who lost the thumb and index finger of his left hand. He was earning in excess of \$750 per year when injured, and applied to the industrial commission to fix the amount of compensation which he was entitled to receive. The commission referred the inquiry to one of its members to take testimony and report his findings. The findings were to the effect that the earning capacity of the employee, Winters, had been reduced to \$9 per week by reason of the injury, and that he was entitled under the law to recover 65 per cent of the difference between the maximum amount allowable for total disability, i. e., \$14.42 per week, and this reduced amount of \$9, or the sum of \$3.52 per week for a period of 15 years, aggregating \$2,745.60. The commission made an award in accordance with this recommendation. The employing company commenced an action, alleging, among other things, that the award had been made without a final hearing before the commission. This contention was sustained in the circuit court of Dane county, and the record was remanded for further hearing before the commission. At this hearing the commission concluded that Winters was totally incapacitated from ever again following the occupation of shingle sawyer, though he might find other occupations "where he can earn a good wage, and we have little doubt that he will find his place as a useful self-supporting member of society." The commission's award was 65 per cent of the maximum allowance, or the sum of \$9.37 per week until the payments should aggregate \$3,000.

The statute provides that in case of partial disability the injured workman shall receive 65 per cent of the weekly wage loss during the period of such partial disability. The measurement of this loss is directed in another paragraph to be such as "shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident." The commission found that Winters could never return to the employment in which he was working at the

time of the accident, so that there was a total permanent impairment of earning capacity in such employment. The company contested this finding in the circuit court of Dane County, but judgment was against it, whereupon it appealed, this appeal resulting in the judgment of the circuit court being affirmed. The grounds for this position are set forth in the following quotations from the opinion of the court.

"It is perfectly obvious that the commission did not find, and did not intend to find, that Winters was incapacitated from engaging in all gainful occupations. It did find that he was permanently disabled from engaging in the work of shingle sawyer. The commission construed the compensation act to mean that, where an employee is totally disabled from performing the particular work which he was performing when the injury occurred, he is entitled to recover the maximum allowance for total disability, no matter what his earning capacity may be in other callings. The circuit court came substantially to the same conclusion.

If subdivision 'b' of section 2394-9, above quoted [compensation for partial disability], stood alone, there could be little doubt about what it meant. But by subdivision 2 of section 2394-10 the legislature explains how the loss of wages for the partial disability provided for in subdivision 'b' is to be ascertained and computed. It is 'such a percentage of the average weekly earnings . . . as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident. . . .' This is just what the commission allowed; it having found that he was totally incapacitated from performing his former work. This is a new statute containing a large number of provisions which deal with a new and a complex subject. It may well be that, if the legislature had in mind the concrete case with which we are dealing, it would have provided for such a contingency. It is not very probable that

it was intended to give an employee who lost a thumb and finger of the left hand the same compensation that he would be entitled to receive had he been so maimed that he was totally incapacitated from doing any kind of work. If this is so, then it is apparent that the legislature overlooked the contingency with which we are dealing, or it in fact has provided that the future earning capacity of the employee must be taken into account. If the former is the correct diagnosis, then the remedy rests with the legislature. It is its function to amend the act where amendment is found necessary. The fact that injustice may result in the instant case is nothing that concerns the courts unless some constitutional right of the appellant is being invaded. Where a statute plainly says, as this one does, that the loss in case of partial disability shall consist of such percentage of the weekly earnings of the employee as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, we fail to see how the court would be justified in adding thereto the following limitation: 'Less such sums as the employee might be able to earn in some other calling.' This in effect is what the court would have to do if it adopted the construction for which the appellant contends. There is nothing doubtful, obscure, or ambiguous about the language used.

Courts in construing statutes look to consequences, but only where there is room for construction by reason of ambiguous language being used and where a literal construction would lead to some absurd result."

§ 140. Permanent Partial Disability.

Every act, now in effect, except that of California, Arizona, Kansas, Massachusetts and New Hampshire, has a schedule showing, definitely, certain injuries which in themselves constitute permanent partial disability and for which a certain definite number of weeks' compensation or a definite sum is payable. Illinois, Rhode Island, Texas and Massachusetts are examples of States where the scheduled

benefits are in addition to other compensation; and Connecticut, Indiana, Kentucky, New York and Oklahoma are examples of States where the scheduled benefits are in lieu of other compensation for the injuries named.

§ 141. Injuries Other Than Those Scheduled.

Merely because an injury is not specifically scheduled does not remove it from the operation of the acts. The schedules are very definite in their terms but they are not intended to include all injuries of a permanently partial nature, *Wagner v. American Bridge Co.* 158 N. Y. Supp. 1043. All injuries not named are usually intended to be covered by the general provisions, *Northwestern Fuel Co. v. Leipus* 161 Wis. 450, 152 N. W. 856. However, it was held in New York that if any injury to an employee should be held not to be within the purview of the act because it "provides no scale or gauge by which to determine what compensation should be provided" then the right to recover remains as it was before the act was passed. *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, 154 N. Y. Supp. 423, 9 N. C. C. A. 342.

Compensation acts do not take away the right of recovery for an injury without substituting another in its place.

For injuries in cases of permanent partial disability not scheduled, compensation is to be determined by the percentage of disability actually suffered. In arriving at this percentage, which is entirely a question of fact, a wide latitude is allowed. Any facts that are pertinent may be taken into consideration. For further consideration of above subject see 9 N. C. C. A. 342-349.

§ 142. Impairment of a Member Not "Loss."

Under the Wisconsin statute which has a schedule of injuries and benefits it was held that where as a result of an injury an employee "would have a forearm that is functionally 50 per cent of the normal forearm" he could not be said to have lost his arm under the schedule. In that case, *Northwestern Fuel Co. v. Leipus*, 161 Wis 450, 152 N. W.

856, 9 N. C. A. A. 347, the court said: "Obviously the 'loss' of a member designated in the schedule has reference, not to the impairment of the member by the injury, but to the physical loss of it. All through the schedule there is nothing to indicate that impairment of a member was intended to be loss of a member or that reduction of the efficiency of the member one-half would be one-half loss of the member. 'The loss of an arm at the elbow' or 'the loss of a forearm at the lower half thereof' does not mean the impairment of the arm, but the actual physical severance of it. The fact that the schedule so specifically fixes the precise injury for which compensation is allowed, excludes the idea that the schedule covers any other or different injury."

In *Barbour Flax Spinning Co. v. Hagarty* 85 N. J. Law 407, 89 Atl. 919, 4 N. C. C. A. 586, judgment was rendered in favor of the petitioner, Hagarty, in the lower court for \$5 per week for 200 weeks, for the loss of motion of his right arm at the elbow, consisting of permanent inability to bend it more than 90 degrees. The amount of compensation awarded was the same as the law provides for the loss of an arm. The law provides that compensation for injuries not specified shall bear such relation to the amounts stated in the schedule of the act as the disabilities bear to those produced by the injuries named in the schedule. On appeal the supreme court held that the award could not be justified under the provision just mentioned, and therefore reversed the decision and remanded the case for a new trial.

§ 143. Permanent Partial Disability Though Earning Power Unimpaired.

In *De Zang Standard Co. v. Pressey*, 86 N. J. Law 469, 92 Atl. 278, the court said in part:

"This case arises under the workmen's compensation act, and the principal question argued is whether the petitioner should receive an award for the permanent impairment of the function of his right arm, when it is shown

that he has been earning the same pay as he earned before the accident.

The petitioner as a carpenter in the employ of the prosecutor earned \$20 a week. He sustained an accident out of and in the course of his employment which caused a fracture of the bone of the forearm known as the 'radius' at or near the elbow, and which is admitted to have caused the permanent loss of 30 per cent of the use of his arm. After two weeks he went back to work under the same employer, at the same wages, and after a time entered the employ of his son at the same wages. Later on when work became slack he worked independently, receiving the same pay for the time he was actually employed.

The prosecutor's principal claim is that there can not be a statutory 'disability' when it appears that the earnings of the petitioner had not been impaired. With this we can not agree. It may well be that for a time an injured employee might be able to earn the same wages as before the accident; but, as we read the act, the disability intended thereby is a disability due to the loss of a member, or part of a member, or of a function, rather than to mere loss of earning power. Even if this were not so, it does not follow that the injured employee had not sustained a distinct loss of earning power in the near or not remote future and for which the award is intended to compensate. If it were a question of damages at common law, the elements of damage would consist of present loss of wages, probably future loss of wages, pain and suffering, and temporary or permanent disability, which loss the jury would be at liberty to assess quite independently of the fact that the plaintiff was earning the same wages, except so far as that fact might be evidential with regard to the extent of the disability."

See also *Burbage v. Lee* 87 N. J. Law 36, 93 Atl. 859.

§ 144. Concurrent Disability from Different Injuries.

The compensation law speaks in terms of disability unless the injuries are covered by schedule. Therefore if an



employee suffers several injuries in one accident, these injuries are not treated separately, nor is compensation allowed as if each were the result of a distinct accident. Their combined effect is treated as a single cause of disability and compensation is allowed according to the actual degree of disability suffered as a result of all of them within the terms and limits of the act. Therefore if an employee suffers in one accident the loss of an arm and also other injuries not scheduled, compensation is payable only for the period scheduled for the loss of an arm, unless the actual disability resulting from the other injuries exceeds the number of weeks scheduled for the loss of an arm.

In *Limron v. Blair et al.*, 181 Mich. 76, 147 N. W. 546, 5 N. C. C. A. 866, an employee lost a foot and besides his shoulder was broken, the other leg was badly gashed, and minor injuries. The court said: "The statute speaks in terms of disability. All of its provisions being considered it does not mean that compensation must be paid during a period of actual disability and also, if a member is lost, during a period equal to the one during which total disability is deemed to continue. It does not provide a specific indemnity for the loss of a member in addition to compensation for disability. The aim of the statute is to afford compensation if the employee is disabled. When the period of disability ends, compensation ceases."

See also *State Ex rel Kennedy v. District Ct.*, 129 Minn. 91, 151 N. W. 530, 8 N. C. C. A. 478; *Fredenburg v. Empire United R. Co.*, 168 App. Div. 618, 154 N. Y. Supp. 351; see *L. R. A.* 1916A (note) 257, and 5 N. C. C. A. (note) 866-870.

In *Fredenburg v. Empire United R. Co* (*supra*) the court said:

"The act provides but the single rate of compensation, to wit, 66 2-3 per cent of the employee's average weekly wages; and this percentage for a longer or shorter period is applicable to all disabilities, whether total or partial, and is the maximum compensation provided for by the statute.

The act was not intended as a source of profit to the employee, or as a means of punishment of the employer, who in many cases is wholly free from any fault in connection with the accident. If concurring awards may be allowed, it is easy to see how that practice may be carried to such an extent as to become very burdensome and unjust to the employer and very unfortunate to an improvident employee, and to a considerable extent render nugatory the beneficent purpose of the statute.

While the commission has found that the injuries other than those resulting in the loss of the foot have disabled the claimant from working until January 28, the date of the report, and has awarded compensation therefore to February 27, 1915, and has continued the case for further hearing, there is no finding that such disability is permanent, as would be the case in the event of the loss of a thumb or finger, or that the disability will exist at the expiration of the period of 205 weeks.

The award of compensation for the loss of the foot should be affirmed. The award of compensation for injuries other than the loss of the foot should be reversed, but without prejudice to the further continuance of the case, and to the right of the claimant to make further application to the commission, or its successor, for an award of compensation on account of such other injuries."

In *O'Connell v. Simms Magneto Co.* 85 N. J. Law 64, 89 Atl. 922, 4 N. C. C. A. 590, the injuries consisted of fractured skull, broken collar bone and ribs, injury to eye, paralysis of right side of mouth, injury to right nostril and impairment of use of right ear and right arm. Making an allowance for each of these, and totaling them, the judge of the lower court arrived at a total of 340 weeks, and judgment was rendered awarding compensation to the petitioner for that length of time. On appeal, the judgment was reversed and the case remanded for revision of the compensation, the court saying:

"The evidence of the petitioner shows conclusively that

the disability of the petitioner is far from total. Under the statute only 400 weeks' pay could have been allowed for total permanent disability, such as loss of both hands, arms, feet, or eyes. None of the injuries suffered by the petitioner are specifically provided for in the schedules contained in the act, and allowance therefor must have been made under the provision that the compensation in other cases shall bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule.

There is no evidence that the disabilities of the petitioner stand to total disability in the proportion of 340 to 400. On the contrary, the evidence makes it clear that the proportionate extent of the disability is very much less. The difficulty arose probably from the desire of the trial judge to award what he thought was fair compensation. This was, however, disregarding the statute, not following it except in form."

§ 145. Injuries to Foot or Leg.

The schedule of each act usually provides specifically what constitutes the loss of a foot or leg.

In *Rakies v. Del. L. & W. R. Co.* 89 Atl. 953, 4 N. C. C. A. 734, the court had to determine the amount of award for an injury resulting in the loss of motion of the right ankle of the claimant on account of an electrical burn. The judge of the court below had rated the disability as equivalent to the loss of a leg, which, according to the schedule embodied in the statute, would give compensation on a basis of one-half the injured man's wages for a period of 175 weeks. The allowance for the loss of a foot is half wages for 124 weeks. The supreme court held that the loss of function of the ankle corresponded to the loss of a foot rather than the loss of a leg, the statute providing that for injuries not named the compensation should bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named. Under this provision it was decided that the amount should not exceed that allowed for the loss of a foot, and "whether it should equal

that is a matter that ought to be determined by the trial judge."

In Connecticut where an injury is such that the usefulness is no greater than an artificial foot would give, an award was made for total loss of the foot. *Mahoney v. Seymour Mfg. Co.* 1 Conn. Comp. Dec. 292.

All injuries to feet or legs not scheduled are compensable in so far as they create a disability in some degree and are the result of an accident or injury to which the act applies. For note on injuries to feet, see 9 N. C. C. A. 773-792.

§ 146. Loss of Hand or Arm.

In *State Ex rel Kennedy et al., v. District Court of Clay County et al.*, 129 Minn. 91, 151 N. W. 930, 8 N. C. C. A. 478, the court said:

"The trial court found that plaintiff's hand was crushed, the flesh, muscles, and tendons thereof torn; that these injuries so affected the hand as to cause the plaintiff to lose, to a large extent, the power to flex the fingers or to grip or use the ordinary workman's tools that he was accustomed to use in the work he was qualified and accustomed to do; that the circulation of blood in the hand was greatly impeded and the nerves of sensation and control impaired to a considerable extent. These injuries, the court found, resulted in the permanent partial disability of the hand, amounting to at least 85 per cent of the total disability or the loss of the use thereof. The court further found that plaintiff also suffered injuries to his right arm 'by' the crushing of the bones thereof and the straining and tearing of the ligaments and muscles of said arm, all of which has caused the permanent partial disability of said arm to the extent of at least 35 per cent of the total disability or loss of the use thereof.'" The trial court awarded separate amounts for the injuries to the hand and arm. The appellate court continued:

"We think the trouble arises largely, if not wholly, with the attempt of the trial court to separate the injuries into two units. Those to the hand and those to the arm. . .

The act provides (G. S. 1913 § 8230K) that 'amputations between the elbow and the wrist shall be considered as



equivalent to the loss of a hand.' We think that injuries between the elbow and the wrist should be considered injuries to the hand. *Rakies v. Delaware L. & W. R. Co.* (N. J.) 88 Atl. 953, 4 N. C. C. A. 734. If there were no injuries except to the hand and forearm, we think the court should have awarded compensation based upon a percentage of total disability to the hand. If there were permanent injuries to the arm above the elbow, the court should not have attempted to separate these injuries from those to the hand, but should have found the percentage of total disability to the arm as a whole, and should have awarded compensation accordingly. If the division of the arm into two units for the purpose of fixing compensation under the act is proper, there would be no reason for saying that the thumb, the different fingers, the phalanges of the thumb and each finger, might each be considered as a separate unit and the compensation allowed for these injuries added together and added to the compensation allowed for a hand or arm. This was plainly not the intent of the law. There should be but one unit for measuring the injury and the compensation to be awarded."

In *Floccher v. Fidelity & Deposit Co. of Md.* 221 Mass. 54, 108 N. E. 1032, Frank Floccher was granted certain compensation by the industrial accident board, and the insurer appealed. The employee's right hand was capable of a small amount of motion in the thumb and first finger, while the other fingers were paralyzed, and the circulation impaired so that the hand frequently went to sleep. The court affirmed the decision giving compensation for loss of a hand, holding that it was permanently incapable of use, since the possible use was so small as to be negligible. It also held that the evidence that an operation might improve the condition was so slight that the claimant could not be required to submit to it on peril of forfeiture of his compensation.

In *Rockwell v. Lewis*, 168 App. Div. 674, 154 N. Y. Supp. 893, the facts were that the compensation commission de-

terminated that the claimant had lost the index, second and third fingers, and that his fourth finger was mutilated. For the four injuries they allowed respectively 46, 30, 25, and 4 weeks, aggregating 135 weeks at \$11.54 per week, or \$1,757.90. Subsequently, in February, 1915, the commission again took up the case, reached the conclusion that the employee had lost the use of his hand, and made an additional allowance, bringing the total time up to 244 weeks. The employer and insurer urged that the commission had no power to make awards other than those specifically provided for by the statute for the loss of the separate fingers. The court, however, affirmed the later award, holding that a finding of permanent loss of use of the hand, which is made by the statute equivalent to the loss of the hand, was justified by the facts.

In *Meley v. Massachusetts Employees' Ass'n*, 219 Mass. 136, 106 N. E. 559, the insurer appealed from the award of the industrial accident board. A provision of the amendment to the act was in controversy which is to the effect that the additional amounts to be paid "in case of the loss of a hand, foot, thumb, finger, or toe," shall also be paid "in case the injury is such that the hand, foot, thumb, finger, or toe is not lost but is so injured as to be incapable of use; provided, that when the incapacity ceases the additional payment shall also cease." The industrial accident board had held that the right hand was incapable of use, and the court held that there was evidence to support this finding, since it showed that the flexor tendons of nearly all the fingers and of the thumb were cut, and that the hand could be used only as a hook. The court also held that the statute warranted giving additional compensation for an injury to one finger of the left hand.

For further note on injuries to or loss of hands, see 8 N .C. C. A. 478-484.

§ 147. Injuries to Fingers.

In *Feinman v. Albert Mfg. Co.* 155 N. Y. Supp. 909, 170 App. Div. 147, Annie Feinman, while operating a sewing

machine in manufacturing underclothing, was injured by a needle puncturing the third finger of her left hand, which necessitated its amputation at the first phalange. Cellulitis of the joints developed, so that the remainder of the finger, while not removed, became useless. Two-thirds of wages for 25 weeks is fixed by the law as the compensation for the loss of a third finger, and it is provided that in other cases of this class, not specifically provided for, the compensation shall be two-thirds of the difference in earning capacity during the continuance of partial disability. The compensation commission after several hearings had granted the allowance for 25 weeks, and then made a further award, adopting the theory of the claimant that there was not a "loss" of the finger, so that the provision for "other cases," permitting payments for wage loss, became operative. The court reversed this award, holding in accordance with the contention of the defendants, that the condition amounted to a loss of the finger, and that the amount of compensation under such circumstances should certainly not be more than that for the complete loss by amputation.

In *re Ethier* 217 Mass. 511, 105 N. E. 376, 5 N. C. C. A. 611, it was held that the Massachusetts workmen's compensation act and its amendment, which provides that the same amount as for loss of the member shall be paid "in case an injury is such that the hand, foot, thumb, finger, or toe is not lost, but is so injured as to be permanently incapable of use," does not provide for damages for permanent injury for the injury of a phalange not resulting in the permanent incapacity of the entire finger.

The award of compensation under the New York Act of half of the amount payable for the loss of an entire finger was held proper where practically all of the outer phalange of the third finger was cut off. In *re Petrie* 109 N. E. 549, 215 N. Y. 335.

Where a man received an injury, under the New York Act, which resulted in the total loss of the index, second

and third fingers, while the fourth finger was stiff and practically useless, he was held to be entitled to compensation as for a totally useless hand. *Rockwell v. Lewis* 154 N. Y. S. 893, 168 App. Div. 674.

An injury resulted in the loss of a part of the second phalange of an index finger. It was held that compensation was confined to that provided for the loss of an entire finger. *Fortino v. Merchants Despatch Transp. Co.* 156 N. Y. S. 262.

In *James Bannister Co. v. Krieger* 84 N. J. Law 30, 85 Atl. 1027 rehearing denied 89 Atl. 923, the question concerned an award for the loss of the first phalanx of the index finger. The law prescribed that the award for a single phalanx should be one-half of the amount of the award for the loss of an entire finger, and also that the amount paid should be 50 per cent. of the wages earned, no award to be for less than \$5 per week. On this basis the award for the single phalanx was as large as for the entire finger inasmuch as the claimant was earning but \$8.50 per week, so that the minimum rate fixed by the statute prevented a proportionate reduction. The employer contended that the time during which payments should continue should be reduced by one-half, but the court below ruled that the provision of law related to the amounts payable and not to their duration, and on this point the supreme court upheld the court below.

The employer also contended that the 35 weeks during which payments were to continue should be reduced by a period of two weeks during which, according to the statute, medical and hospital services were to be furnished the injured workman. The trial court held, however, that the 35 weeks during which compensation payments were to be made were independent of the provision for medical services during two weeks, and could not therefore be reduced as the employer contended.

Under the discretion conferred by the law, the trial judge had commuted the periodical payments allowed to a

lump sum. He did this simply by multiplying the weekly allowance by the number of weeks, which the supreme court held was erroneous, inasmuch as the present worth of the sum should have been awarded instead of the total product, and for this reason the judgment of the lower court was reversed and the record remitted for further proceedings in accordance with the opinion given.

Where a thumb was badly mutilated, but not lost, it was proper to consider the injury as the loss of one phalange of the thumb. *Weber v. American Silk Spinning Co.* (R. I.) 95 Atl. 603.

In *re Stickley* 219 Mass. 513, 107 N. E. 350, the facts were that Job Stickley was injured December 13, 1912, losing four fingers of his right hand. It was conceded that he was totally incapacitated until May 16, 1913. Between May 16 and October 17 he worked 18 days for his old employer, as watchman and at his old job as a pile driver. It was agreed that he was entitled to compensation for partial incapacity from July 11 to October 17. After October 17, 1913, he was unable to obtain work although he made diligent efforts. The committee on arbitration found that on account of his incapacity to work and his inability to secure employment he was entitled to \$8.70 per week from the last-named date for an indefinite time, subject to the right of review provided in the statute. Since his original wages were \$2.75 per day, this was equivalent to a finding of total incapacity. The industrial accident board made a similar finding. The insurer contended that as a matter of law, there being no physical change, a man who had been only partially incapacitated could not become totally incapacitated, and that even if that were possible such a situation had not occurred in this case. Since, while the board detailed certain testimony, the record did not show that the court had before it all the evidence on which the board based its findings, the court held that it could not determine whether the rulings requested by the insurer should have been given. The degree was therefore affirmed.

In *Maziarski v. George A. Ohl & Co.* 86 N. J. Law 692, 93 Atl. 110, the court said:

"The plaintiff suffered injuries to the index finger and the middle finger of the left hand. That to the index finger was found by the judge to be temporary, and he awarded 50 per cent of the plaintiff's wages for six weeks, during which the injury prevented the use of the finger. He found the injury to the other finger to be equal to the loss of one-half the phalange of that finger; as the plaintiff's wages were \$15, the amount allowed for the loss of a finger would have been \$7.50, and one-half of that, the amount allowed for the loss of a phalange, would have been \$3.75; and an injury, equal as this was found to be, to the loss of one-half of the phalange, would, under the clause providing for a proportionate compensation, be entitled to one-half of \$3.75. The judge, however, held the clause providing for a minimum compensation of \$5 to be applicable, and fixed that amount for 30 weeks as the proper compensation. We have just sustained this view in *James A. Banister Co. v. Kriger*, 89 Atl. 923. The allowance of compensation for both the temporary injury and the permanent injury has been sustained in *Nitram Co. v. Court of Common Pleas*, 84 N. J. Law, 243, 86 Atl. 435. That distinct damage may be allowed for injury to each finger is sufficiently indicated by the provision of the statute that the amount received for more than one finger shall not exceed the amount provided in the schedule for the loss of a hand."

In *re Nichols* 217 Mass. 3, 104 N. E. 566, Ann. Cass. 1915C 862, 4 N. C. C. A. 546, the administratrix of a deceased employee began a proceeding for compensation, and the decree of the superior court of Suffolk County awarded her the damages specified by the act for the death of an employee. The employee himself had received 12 weeks' compensation for the loss of "at least one phalange of a finger" in addition to the amount for disability. Afterwards blood poisoning developed and he died. The insurer con-

tended that the payment for loss of the finger should be deducted from the compensation awarded to the widow. The court, however, disallowed this deduction, since the payment for 12 weeks for the loss of a part of a finger is expressly stated to be "in addition to all other compensation."

In *Sinnes v. Doggett* 80 Wash. 673, 142 Pac. 5, the industrial insurance commission awarded compensation for partial disability in the amount of \$1,200, in addition to \$45 for loss of time, to Thomas Sinnes, for the loss of several fingers on each hand. He appealed, the superior court of King County affirmed the award, and he again appealed, contending that his disability was total and permanent.

The accident occurred while he was in the employ of the Moore Logging Co. The compensation act provides that permanent total disability means the loss of both legs or both arms, or one leg and one arm, total loss of eyesight, paralysis, or other condition permanently incapacitating the workman from performing any work at any gainful occupation. It also states that permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, etc.; and that for permanent partial disability the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, and not in any case to exceed the sum of \$1,500.

The supreme court held that the questions involved were questions of law; that the injury was within the definition of permanent partial disability, and there was no reason for the granting of a jury trial; and that the amount of compensation was within the discretion of the commissioners, limited only by the prescribed maximum of \$1,500. The action of the court below in dismissing the appeal was therefore affirmed, and the award of \$1,200 allowed to stand as originally made.

For note on injury to fingers including many cases from Workmen's Compensation Boards and Commissions see 8 N. C. C. A. 352-368.

§ 148. Injuries to Eyes.

In *Vishney v. Empire Steel & Iron Co.* 87 N. J. Law 481, 95 Atl. 143, John Vishney petitioned for compensation against the company named, his employer, and the company appealed from a judgment fixing compensation. The employee was blinded by a powder blast, which resulted in the loss of four-fifths of the use of both eyes. His average wages were \$11.66 per week. The accident occurred December 15, 1913. Two hearings were had upon the matter. At the first, on April 27, 1914, medical witnesses testified that the conjunctivitis from which the employee was suffering would, in their opinion, yield to hospital treatment in three months. The employee was therefore at this time awarded, for temporary disability, one-half his weekly wages from the time of the accident to that of the hearing to be paid in a lump sum, and the same weekly amount, \$5.88, to be paid weekly for 13 weeks additional. Leave was given him to apply to the court at the end of that time if a cure had not been effected. This he did, and it was shown that permanent disability existed to the extent of 80 per cent. of the use of each eye. The schedule compensation for the loss of one eye being 50 per cent of wages for 100 weeks, he was awarded this compensation for 80 weeks for each eye, or 160 weeks in all, to run from the termination of the payments for temporary disability on July 27, 1914.

The employee claimed that it was erroneous to find that the temporary disability ceased on July 27, 1914. The court held that there were facts to warrant such a finding, and defined temporary disability in the following language of Judge Kalisch:

"Temporary, as distinguished from permanent disability, under the workmen's compensation act, is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit. An apt illustration is a case where there has been a loss of both arms. The temporary disability to be considered in such an

instance is the physical state of the patient until the stumps are healed and he is able to get about. The actual disability to do effective work is the same in either case and continues for life. (*Birmingham v. Lehigh & Wilkes-Barre Coal Co.* 95 Atl. 242.)”

That compensation for the permanent disability had not been awarded for a long enough period was determined by the court as follows:

“In the present case it was not ascertained until the second hearing whether or not the prosecutor’s injuries would be of a permanent character.

The trial judge proceeded on the theory that because the compensation for the loss of an eye is fixed at 50 per cent of the weekly earnings for 100 weeks, compensation for the loss of or injury to each eye should be considered separately under that clause, and, having found that each eye had lost four-fifths of its usefulness, he calculated the number of weeks for which compensation should be made on the basis of an 80 per cent loss of each eye, which would make 80 weeks for each eye, or a total of 160 weeks for both.

The trial judge evidently overlooked that provision of the statute which, among other things, provides that the loss of both eyes shall constitute a permanent disability, and that compensation shall be made therefor according to clause b.

Reverting to clause b we find that the compensation for the loss of both eyes shall not exceed 400 weeks. It appearing that there was a loss of usefulness of both eyes to the extent of 80 per cent the prosecutor was entitled to compensation for 320 weeks.”

In *Hirschhorn v. Fiege Desk Co.* 184 Mich 239, 150 N. W. 851, the facts were that while he was operating a machine for the company named, a piece of emery flew into the eye of the employee Hirschhorn. The emery was removed, but inflammation and iritis set in, and he was totally incapacitated for nine weeks. A scar on the cornea

over the pupil remained, which diminished the vision of that eye between one-third and one-half. The employee, however, went to work at the same employment and wages as before. The board awarded him compensation for the total disability, and for 35 weeks in addition for partial disability, as the fair proportion of the 100 weeks provided for the entire loss of an eye.

Section 10 of the workmen's compensation act of Michigan, relating to partial disability, provides for payment of one-half the difference between the wages which the injured employee earns after the injury and that previously earned, and also contains a schedule of payments for specific injuries, which does not mention injuries to the eye less than total loss of vision. Since neither of these provisions applied to the present case, the court held that the additional compensation should not be allowed.

It was held under the Mass. Act that an award for partial disability should be based on the difference between the employee's earnings before and after the injury, but in case the employee is earning less because of a depression in business, the loss occasioned by this depression should be deducted from the difference between what he earned before and what he earned after the injury. *In re Durney* 222 Mass. 461, 111 N. E. 166.

Where after an injury an employee had 10 per cent normal vision with glasses and 50 per cent without them. The injury did not amount to a total loss of the eye and he was entitled only for partial loss as measured by lessened earnings. *Cline v. Studebaker Corp'n.* 155 N. W. 519 (Mich.) L. R. A. 1916C 1139.

In *International Harvester Co. v. Industrial Comm.* 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B 330, 5 N. C. C. A. 822, the facts were that Ernest Koenig, an employee of the company named, was injured March 5, 1912, by a particle of steel entering one of his eyes. The piece of steel was removed by a magnet, but the employee was incapacitated for work for 10 weeks and 4 days, and there was per-

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manent impairment of the sight of the eye. He was paid for his loss of time and doctor's bills as provided by the act. He resumed work for the company at his former employment, operating a drill press, and up to the time of the hearing for compensation had earned apparently a little more per day at piecework after the resumption of work than before the accident. The industrial commission in its decision said that it was "satisfied from its investigation of injuries of this character and from the testimony that a man injured as applicant was injured can perform the labor that applicant was doing prior to the injury without difficulty." It further said: "The commission is also convinced that in most employments a one-eyed man is physically able to earn substantially the same wage as a man with two eyes."

The commission also found that the applicant's loss of wage because of permanent partial disability was \$2.16 per week, and ordered the company to pay him \$1.41 per week for 15 years. This finding was based on the likelihood that it would be less easy for the employee to secure work on account of his defective sight. The statute provides that the loss in wages for which compensation may be made shall consist of such percentage of the average weekly earnings of the injured employee as shall fairly represent "the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident."

The court discussed the grounds on which the award of the commission can be set aside, which are stated in the statute as follows: (1) That the commission acted in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award. It held that the first ground would cover cases where the commission made a finding of fact without anything upon which to base it, and after full consideration of the supposed basis of the finding that the employee's deficiency in earning power amounted to 15 per cent of his

former wages, which basis consisted largely of the results of investigations made by the commission itself, and consideration of the statutes of other States, etc., the court decided that there was no material evidence, also that the loss of earning power of a man with one eye was not the subject of judicial notice; and that the judgment should be reversed and the cause remanded to the commission for further hearing, or judgment entered for the Harvester company, as the circuit court should determine.

Three judges dissented, holding that "it was in evidence that the claimant lost an eye, and, in the exercise of common knowledge and observation, the commission was authorized to infer from this that his capacity to obtain employment was impaired."

In *Czuprinski v. Mechanical Mfg. Co. Ill. Ind. Bd. Nov. 23, 1914, 6 N. C. C. A. 889*, the Illinois Board awarded compensation for a 50 per cent impairment of vision after reviewing the above case.

In *Feldman v. Braunstein (N. J.) 93 Atl. 679*, Samuel Feldman brought action against Charles Braunstein under the workmen's compensation act. Judgment was for the petitioner in the court of common pleas of Hudson County. The judge found that the injury was temporary in character if an operation was performed, but that if an operation was not performed the injury was permanent, and amounted to 90 per cent of the loss of an eye. He therefore determined that the injury was temporary, and that the petitioner was entitled to compensation during the disability, not to exceed 300 weeks. The compensation for loss of an eye is for 100 weeks. The supreme court reversed the judgment, holding that compensation should be for the last-named period on a basis of permanent disability, as the determination could be based only upon the facts before the court and existing at that time, without reference to the probable effects of an operation. It pointed out that if the operation was had and the disability cured prior to 100

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weeks, a modification of the decree reducing the period of compensation might be secured by petition.

In *McCoy v. Michigan Screw Co.* 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A 323, 5 N. C. C. A. 455, the loss of the sight of an eye, after an injury by a flying particle of steel, caused by a gonorrheal infection in the eye due to the fact that the injured man who had this disease rubbed it, was held not to be compensable.

For note on loss of or injury to eyes, citing further cases, see 6 N. C. C. A. 880-899.

§ 149. Injuries to the Ear.

Almost every Workmen's Compensation Act provides a definite schedule of injuries such as the loss of a hand, finger, arm, foot, toe, or leg. A few of them provide specific benefits for impairment of hearing, for instance, Wisconsin, Oregon, Indiana, Connecticut, Colorado, Minnesota, Nevada and Vermont. But none of the acts provide in their schedules of specific injuries for loss of an ear.

The majority of the acts contain a provision similar to the Kentucky act which covers "all other cases of permanent partial disability, including any disfigurement which will impair the future usefulness or occupational opportunities of the injured employee." Except for medical attention and injuries scheduled, there is no compensation without disability. If an injury to the ear incapacitated a man from work, compensation would be payable under the act as in any other case of disability. But in order to obtain compensation for the loss of or injury to an ear, or for impairment of hearing, it would generally be necessary to determine, that the injury was permanent, that it partially disabled the employee, and in cases of disfigurement, that it will impair his future usefulness or occupational opportunities.

Until amended in 1916 the New York Act did not have a disfigurement clause and it was held that a man who lost part of an ear from the bite of a horse had no remedy under the old act and could sue at common law. *Shinnick v.*

Clover Farms Co. 169 App. Div. 236, 154 N. Y. Supp. 423, 9 N. C. C. A. 342.

§ 150. Disfigurement.

In order to come within the act it is usually necessary to prove the fact of disfigurement and the impairment of future usefulness or occupational opportunities before a claim for compensation on this ground is allowable. Whether or not there is any disfigurement is in each case a question of fact.

It has been held that where an employee in operating a press lost the tips of two fingers of his right hand, impairing the sense of feeling, and permanently incapacitating him from doing the particular kind of specialized work he did at the time of the accident, there was such disfigurement as entitled him to compensation under the Illinois law. He was allowed \$454.08. *Stevenson v. Illinois Watch Co.*, 186 Ill. App. 418, 5 N. C. C. A. 858. The Illinois board held in one case that the loss of a tooth under the facts did not constitute disfigurement. *Niemark v. West Coast R. & Mfg. Co.*, 5 N. C. C. A. 859. But where two artificial and two natural teeth in the front of the mouth were knocked out, the same board held otherwise and allowed \$50 for the disfigurement. *Rupczynski v. Wisconsin Steel Co.*, 5 N. C. C. A. 860. The same board allowed \$154 for a scar which after an injury disfigured the top of a man's head. *Harpstead v. Alexander*, 5 N. C. C. A. 861.

On this point in the case of *Ball v. Hunt & Sons, Ltd.*, 28 T. L. R. 428, 5 B. W. C. C. 459, 5 N. C. C. A. 862, the English court said: "The weekly payment may be ended or diminished or increased, according, presumably, as the ability to earn has completely returned, has increased, or has diminished. There would be no meaning, it would appear to me, in these provisions making the amount of wages which were, are, or can be earned so much the basis of compensation if the market for the workman's labor has to be left out of consideration. The earning of wages depends as much on the demand for the workman's labor as

it does upon his physical ability to work. If, because of his apparent physical defects, no one will employ him, however effective he may be in fact, he has lost the power to earn wages as completely as if he was paralyzed in every limb."

It was held in Illinois that an employee who lost a forefinger and injured his thumb as the result of an accident, and after fifteen weeks was able to earn as much as before he was injured, could recover an additional sum for disfigurement of his hand. *Waters v. Pekroehler Mfg. Co.*, 187 Ill. App. 548.

Disfigurement is a fixed condition and therefore a settlement once made in regard to it with the approval of the board is final and not subject to review as are other cases where the disability is changeable in degree.

For note on disfigurement as a ground for compensation see 5 N. C. C. A. 858-865.

CHAPTER V

AVERAGE EARNINGS

Section.

151. Average earnings as basis for compensation in general.
152. Average weekly wages as a question of fact.
153. General income as affecting earnings.
154. Effect of "laying off."
155. What is "seasonal occupation."
156. Grade of employment as criterion for average earnings.
157. Regularly employed in a higher grade of work.
158. Wages earned from more than one employer.
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160. Regulations of labor unions as affecting average earnings.
161. Idleness as a result of normal stoppage of work or general holidays.
162. Various outside influences affecting earnings.
163. Meaning of "average weekly wages," and "full time."

§ 151. Average Earnings As Basis for Compensation In General.

All compensation is based on average earnings, but the method of arriving at what this amount shall be differs somewhat under the various compensation acts. The method provided by any particular act is of course the only test for arriving at the basis of compensation in that particular jurisdiction. While in some States, as Illinois and Iowa, the words "average annual earnings;" in some, as Oregon and Washington, the words "average monthly wages;" in some as in New Jersey, the words "average daily earnings;" still in the great majority of the States the words "average weekly wages" are used, although these may differ slightly in the method prescribed for computing them.

Some States proscribe elaborately how "average weekly wages" shall be computed under given variations in condi-

tions of employment and some, as Kentucky, provide generally and leave it to the board to determine by rules what the method of computation shall be.

In a great many States average weekly wages are computed by multiplying the daily earnings by 300, the average number of working days in the year, and then dividing this result by 52. And if this method is not feasible, then the average wages of another person in similar employment in the same locality are taken as the basis. This is not stated as a general rule—for such a rule can not be laid down—but merely as an example of a method frequently provided for.

Thus, although there is this variance among the different acts, still a decision of one jurisdiction upon a given state of facts, is often helpful in throwing light upon the provisions of any particular act under consideration.

§ 152. Average Weekly Wage a Question of Fact.

What the average weekly wages are is a question of fact and if there is evidence to support the conclusion reached it will not be interfered with (*Williams v. Wynnstay Collieries Co.*, 3 B. W. C. C. 473); but the computation must be made upon the basis proscribed by the law.

§ 153. General Income As Affecting Earnings.

It has been held in England that where the giving and receiving of tips is known to the employer, the money so received may be included in average weekly earnings. *Penn v. Spiers & Pond*, 1 B. W. C. C. 401; *Knott v. Tingle, Jacobs & Co.*, 4 B. W. C. C. 55; *Haines v. Corbet*, 5 B. W. C. C. 372, L. R. A. 1916A (note) 374. The contrary was held in California because the contract of hiring did not contemplate gratuities or tips as part of earnings. *Reynolds v. Smith*, 1 Cal. Ind. Acc. Comm. Dec. (No. 3, 1914) 2, 9 N. C. C. A. 90.

In England board and lodging when furnished in addition to wages are considered in determining average weekly earnings at the cost of the food to the employer and a reasonable allowance for lodging. *Rosenquist v. Boring*, 2 K. B. 108, 24 Times L. R. 504. But in another case in the

same court it was said that the true test was the actual value to the workman of the board furnished by the employer. *Dothie v. MacAndrew & Co.*, 1 K. B. 803, L. R. A. 1916A (note) 160.

When a workman pays wages to a boy hired by him to assist in his work, the English court has held that these wages can be deducted from the workman's average weekly earnings. *Roper v. Freke*, 31 T. L. R. 507, 9 N. C. C. A. 86.

The amounts paid by a miner to his helper should be deducted to obtain the average weekly wages of the miner. *McKee v. Stein*, 47 Scot. L. R. 39, 3 B. W. C. C. 544, *Boyd's Work. Comp.*, § 529.

Average weekly earnings do not include weekly payments by way of compensation for a previous accident. *Gough v. Crawshay Bros.*, 1 K. B. 441, 1 B. W. C. C. 374, L. R. A. 1916 A 374.

A pension from the United States government on account of services rendered in the army or navy or on account of disability incurred in the military or naval service will not be considered in determining the "average weekly wage" or in determining the amount of compensation. *Re Harriett H. Horn*, Claim No. 1013, Ohio St. Lia. Bd. Awd., December 13, 1912. Nor can an amount received from the poor fund figure in average weekly wages. *Gilroy v. Mackie*, 46 Scot. L. R. 325, L. R. A. 1916A 374.

Value of horse hire when an employee was engaged at \$5 per day out of which he agreed to furnish his own horse, was not allowed as wages. *Kid v. N. Y. Motion Picture Co.*, 1 Cal. Ind. Acc. Comm. Dec. (No. 22, 1914) 2, 9 N. C. C. A. 87.

Where an employee received \$3.50 per day for his services and an allowance of \$1.25 additional for the use of the automobile, it was held that the allowance for the machine was rent and could not be considered in determining average weekly wages. *Clark v. Los Angeles Co.*, 1 Cal. Ind. Acc. Comm. Dec. (No. 24, 1914) 62, 9 N. C. C. A. 88.

Money paid by an injured employee to an assistant was

held not to be a part of his earnings, as a basis for determining compensation under the Minnesota Act. *State v. District Court of Sibley County*, 151 N. W. 182, 128 Minn. 486.

In New Jersey an employee received \$15.00 a week and board, which the court value at \$3.00 a week. It was held that his compensation should be 50 per cent. of \$18.00 instead of \$15.00. *Baur v. Court of Common Pleas*, 88 N. J. Law 128, 95 Atl. 627.

Where a plumber was called to the assistance of officers of a village by the village marshal and was killed, the basis for computing the amount of compensation was not his earning capacity as a plumber, but that of one doing policeman's duty in the same or neighboring locality. *Village of West Salem v. Ind. Comm. of Wis.* 155 N. W. 929.

See further note in L. R. A. 1916A 373-374 and 159; 9 N. C. C. A. 86-90.

§ 154. Effect of "Laying Off."

The English rule on this question is stated in the case of *Anslow v. Cannock-Chase Colliery Co., Ltd.*, 2 B. W. C. C. 365, 6 N. C. C. A. 809, the court said: "The object of the act of Parliament was to compensate a workman for his incapacity to earn, which is to be measured by what he could earn under the conditions prevailing before and up to the time of the accident. If the workman takes a holiday and forfeits his wages, that does not interfere with what he can earn. It is only that for a month he did not choose to work. But if it is one of the incidents of his employment to stop for a month, then he can not earn wages for that time in that employment, and his capacity of earning is less. I agree with the Master of the Rolls when he says 'In my opinion the true test is this, what were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which can not be overlooked.'"

See further note, 6 N. C. C. A. 807-817.

§ 155. What Is "Seasonal Occupation."

Any occupation which afforded no employment, regularly during certain seasons of the year or at regular set times during the year would be a "seasonal" occupation. Logging, lumbering and coal mining, under certain conditions, are a few examples of this class of occupations. In the case of *Andrewjwski v. Wolverine Coal Co.*, 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807, the court said: "The mine in question and other mines in this district do not run continuously during the entire year; some entirely suspend operations for several months during the summer and others do not operate during a portion of each month, in a measure caused by the fact that operations are controlled by the sales of the product, which depend entirely upon orders. Operations also depend upon weather conditions. . . . The price paid miners is regulated by what is called a 'scale' made between the operators and the union, and one of the things always taken into consideration in fixing the wages of miners in this district is that the mine does not run steadily and the miner can only work when it does run."

The court held in this case that the average weekly earnings of the deceased were to be ascertained by dividing his average annual earnings in the mine by fifty-two, and that the amount which he earned in other employments during the time the mine was idle could not be included.

§ 156. Grade of Employment As Criterion for Average Earnings.

In *Perry v. Wright* (Eng.), 1 K. B. 441, 1 B. W. C. C. 351, L. R. A. 1916A (note) 151, Lord Cozens-Hardy said:

"Having found that the man has a particular grade and what are the average wages in that grade, there is no obligation to adopt those average wages as the basis of compensation. The personal element then comes in. It will still be open to consider whether the individual workman is an average man or is above or below an average man. This must be so where men in a particular grade are

employed on piecework. You cannot reject evidence of the skill and efficiency of the individual workman. Where payment is at so much per hour for every man in a particular grade, the skill and efficiency may, perhaps, be disregarded, though I am not prepared to say that the age and the habits of the individual may not have such an influence upon his chance of employment as to deserve consideration.

In computing the average weekly earnings of a casual laborer, the arbitrator is not merely to ascertain the amount of the average weekly earnings of men employed in the same class of work as the applicant, but regard must be had to the personal qualifications of the injured workman, and if his actual earnings during the past year or any other evidence showed that he was in fact above the average, that must be regarded."

§ 157. Regularly Employed In a Higher Grade of Work.

Under a provision of the Kentucky act if a workman, at the time of the accident, is employed, temporarily, as a common laborer while his regular employment is that of stationary engineer, for example, only his average weekly wages in this higher employment are to be taken into consideration in computing the compensation due him. But this is not the case if his employment as stationary engineer is only in certain seasons of the year. It must be his regular and usual employment and he must have actually engaged in that occupation "during the year" just previous to his injury.

§ 158. Wages Earned From More Than One Employer.

The question whether wages earned in the service of the employer, in whose employment the accident occurred, are alone to be considered in arriving at the amount of average weekly wages; or whether those earned in other employments, whether concurrent with or just prior or subsequent to it, are also to be considered, has been decided both ways by American courts.

Under the Michigan statute, the first of the above propositions has been upheld. In *Andrewjwski v. Wolverine Coal Co.*, 182 Mich. 298, 48 N. W. 684, 6 N. C. C. A. 807, the court said: "The foregoing consideration of these four classifications shows that the term 'average annual earnings' of the injured employee as used in this act means his average annual earnings in the employment in which he was engaged at the time of the injury. This appears so clearly and emphatically that it is impossible to arrive at any other conclusion and preserve what appears to have been the legislative intent to exclude other earnings in different or concurrent employments, and thus be able to distribute the burden of compensation to each of the several industries wherein the injuries and deaths may occur."

The opposite conclusion was reached in *Gillen v. Ocean Acc. & Guar. Corp'n, Ltd.*, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A 371, where a workman put in full time working for different employers at various times. By considering the wages he earned from all of the employers his average weekly wage was \$13. It was only \$4 in the employment where he was injured. The court held that he was entitled to the \$13 basis, although the act did not specifically so provide, saying:

"Although not stated in precise words, we think that the general import of the act is to base the remuneration to be paid upon the normal return received by workmen for the grade of work in which the particular workman may be classified. This is a case where it is 'impracticable' to reach a result which shall be fair to the workman to the extent intended by the act of giving him compensation for average weekly earnings in any other way than by following the course pointed out in the final clause of the definition.

This is not a case where the usual employment of the employee is only two or three days in a week, as pointed out in *White v. Wiseman* [1912] 3 K. B. 352, 359, but a case where the condition of the workman is continuous

labor in regular employment with different employers. The loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation should be based."

Under the English act as extended by amendment of 1906, it is expressly stated that consideration may be given in a proper case to earnings from employers other than the one from whom compensation is sought. But it has been held that these earnings from others cannot be considered in arriving at average weekly earnings, unless they are made under a contract of employment. *Simmons v. Heath Laundry Co. (Eng.)*, 1 K. B. 543, 3 B. W. C. C. 200.

For note dealing with these questions see L. R. A. 1916A 373.

§ 159. When Weekly Wages Not Fixed Under New Jersey Act.

In *Smolenski v. Eastern Coal Dock Co.*, 87 N. J. Law 26, 93 Atl. 85, 9 N. C. C. A. 531, the only dispute was as to the amount of wages on which the compensation should be based. The man was at the time of the injury employed as a car rider at 25 cents an hour. At other times he earned larger and smaller rates, and his work was irregular, so that the employer claimed that his wages should not be considered to be more than \$12.40 per week, while the judge of the court of common pleas of Middlesex County determined that they were \$15 per week, on the basis of 25 cents an hour for 10 hours a day and six days a week. The court in conclusion said:

"The language indicates that, in a case where weekly wages are not fixed, they shall be taken to be six times the daily wages, and that the daily wages shall be the wages for a working day of ordinary length, excluding overtime. We think it may fairly be held that the legislature meant that the daily wages should be taken to be what would be earned by working for the ordinary number of hours, and that the employee was not to lose by reason of enforced

idleness during some of those hours, nor to gain because on some days he worked overtime.

Wages, the legislature said, must be construed to be the money rate at which the services were recompensed. What is to be considered is not the recompense in fact received, but the rate which the contract of hiring fixed, whether that rate was in fact realized for the whole time or not. We think that in an employment and a community where the regular working week was six days of 10 hours each, and the workman was paid 25 cents an hour, the natural conclusion of most men, if they tried to reduce the hourly rate to a weekly rate, would be that the weekly rate was \$15. The truth is, there is no weekly rate, but we are forced by the statute to fix one in order to determine the compensation to which the workman or his dependents are entitled. Under this compulsion we can think of no better method."

§ 160. Regulations of Labor Unions As Affecting Average Earnings.

In *Thompson v. Richard Johnson & Nephew, Ltd.*, 7 B. W. C. C. 479, 11 N. C. C. A. (note) 678, a man was injured while at work on a wire drawing machine, in operating which he lost two fingers. He returned to work and his employers were willing to give him the old employment at 37s 6d per week. But, during his absence, a trades union had made a rule that none could be employed at such a machine except those regularly qualified by apprenticeship, which this employee was not. The employer gave him work as a laborer at 21s per week. He claimed the difference from his employer. But the court held that his inability to earn his former wages was not due to his injury, but to the action of the trade union, which compelled the employer to use only skilled workmen and members of the union at the machine, and that, therefore, the workman was not entitled to compensation for future disability at the rate of wages he earned at the machine at the time he was injured. The employers had paid him up to the time he was able to

return to work upon a basis of the wages earned at the time of his injury.

§ 161. Idleness As a Result of Normal Stoppage of Work Or General Holidays.

In *Anslow v. Cannock Chase Colliery Co.*, 1 K. B. 352, 2 B. W. C. C. 261, 11 N. C. C. A. 669 (note), it was said:

"The question is in regard to the way in which the average weekly earnings of a workman shall be computed in a case in which a normal and recognized incident of his work was fourteen weeks' stoppage and two weeks of general holidays during the year. The object of the act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. So, too, if there be a casualty accidentally stopping the work. But if it is part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less over the year."

§ 162. Various Outside Influences Affecting Earnings.

In *Jones v. Ocean Coal Co.*, 2 Q. B. 124, 11 N. C. C. A. 671 (note), it was held that where there was a general strike among the workmen the period during which the strike continued could not be counted in arriving at average weekly earnings.

In *Bevan v. Everglyn Colliery Co.*, 1 K. B. 63, 11 N. C. C. A. (note) 674, it was held that where an eight-hour law was passed subsequently to a man's injury, thereby lessening his earning capacity upon his return to work, the employer was not liable for the loss of wages occasioned to the workman thereby.

In *James v. Ocean Coal Co.*, 2 K. B. 213, 11 N. C. C. A. (note) 675, where a man who was hurt was earning at the time £1 4s per week and returned at lighter work for £1

9s 5d per week, and the employer stopped compensation because a fall in wages made the latter sum the regular pay for men in the employment in which the workman was injured, the court said: "I think the maximum fixed in the first instance is entirely independent of the subsequent fluctuation of wages."

In *Griffiths v. Gilbertsens & Co., Ltd.*, 8 B. W. C. C. 548, 11 N. C. C. A. 673, the court said: "It is admitted that you must exclude from consideration the 14 weeks' period of the strike, during which, upon the finding of the learned county court judge, the man was absent through no fault of his own. The strike was due, as I understand, not to his own trade, but to another trade to which his trade was related, and, therefore, those weeks of the strike are excluded."

In *Turner v. Port of London Authority*, 6 B. W. C. C. 23, 11 N. C. C. A. 797, it was held that it was not necessary to calculate average earnings with microscopical accuracy, and that, therefore, 8 days lost through illness in a period of 18 months' employment need not be considered.

But in *Hewlett v. Hepburn*, 16 Times L. R. 56 (Eng.), 11 N. C. C. A. (note) 798, where a man was away from his work eleven weeks on account of illness, that absence was held sufficient to justify a finding that the employment was not continuous under the act of 1897. That portion of the act was amended in 1906 so that now, under the English act, the question of continuous employment is no longer vital, as average earnings may be calculated from wages earned from several employers.

In *Carter v. Lang*, 45 Scot L. R. 938, 1 B. W. C. C. 379, L. R. A. 1916A (note) 154, 11 N. C. C. A. (note) 795, when a workman had been employed thirteen weeks, and during that time had been absent two weeks on account of illness and two weeks on account of general trade holidays, it was apparently held that the absence for illness should not be deducted in arriving at average weekly earnings, but it was clearly held that the two weeks lost on account of trade

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holidays should be accounted for as follows: The amount earned must be divided by the number of weeks in which it was earned to arrive at the average weekly earnings, and then considering the holidays as two weeks out of fifty-two, one twenty-sixth must be deducted from the average earnings so obtained.

In *Bailey v. Kenworthy*, 1 K. B. 441 (Eng.), 1 B. W. C. C. 351, L. R. A. 1916A 153 (note), 11 N. C. C. A. 793 (note), it was held that where an employee was a piece-worker and where, during the year, he was unable to work on account of a break in a canal, accidents to machinery and bank and trade holidays, it was error to divide the amount earned during the year by fifty-two in order to arrive at average weekly earnings, but that the amount received should be divided by the actual number of weeks or parts of weeks in which the work was actually performed without any reduction for the weeks when there was a stoppage of work due to accidents at the plant, but that stoppages on account of recognized holidays, when the employer could not be called upon to furnish employment, were to be considered in reduction in the ratio they bear to the fifty-two weeks of the year.

For notes dealing with the above subjects see 11 N. C. C. A. 787-801 and 666-680.

§ 163. Meaning of "Average Weekly Wages," and "Full Time."

The Kentucky statute provides that "compensation shall be computed at the average weekly wage earned by the employee at the time of the injury reckoning wages as earned while working at full time." The wages considered must be those which would be received by the employee "while working at full time." The result obtained by the computation must be the "average weekly wage earned by the employee at the time of the injury."

The phrase "while working at full time," may refer to the full number of hours of work regularly performed in a

day by the employee under normal working conditions. Thus, if the regular working day in the employment, where a workman was injured, was ten hours, but if on account of slack business conditions the working day had been temporarily shortened to five hours, the employer would nevertheless be entitled to have his average weekly wage figured as if he had actually worked ten hours. The daily wages at full time would then be multiplied by the number of days customarily worked in a year and the result divided by 52 to obtain the "average weekly wage earned by the employee at the time of the injury."

While such a construction of "full time" is possible, it would seem that the better construction would be to consider full time as the actual number of working hours, per day that the employer offered work to employees of the same class as the injured man. He would then be given credit for the full amount of time that he could have put in and for the largest possible amount that he could actually have earned in the service of his employer. The total wages that he actually earned by working whenever the employer offered work, viz., "while working at full time," during the year just previous to the accident could be divided by 52 and the result would be the "average weekly wage earned by the employee at the time of injury reckoning wages as earned, while working at full time."

CHAPTER VI

DEPENDENCY

Section.

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165. Dependency defined.
166. Dependency a question of fact.
167. "Actual dependents."
168. Burden of proving dependency.
169. When wholly dependent.
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171. The award of a wholly dependent person as a vested interest.
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173. Husband and wife, parent and child.
174. When husband and wife live apart.
175. Marriage as affecting dependency.
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177. Effect of marriage of dependent.
178. Effect on dependents of imprisonment of workman.
179. Effect on dependents of release given by employee.
180. Payments to one dependent for the benefit of others.
181. Payments to supposed dependents.

§ 164. Dependency In General.

The purpose of the acts is to provide compensation for those depending upon an injured workman as well as for the workman himself. The acts are usually specific as to the question of dependency in whole or in part, and are the only absolute guide on this question.

Whether or not dependency exists has been universally held to be a question of fact, and necessarily so, because any attempt to lay down strict rules on this subject would result in injustice and the spirit of the law, which is to make payments directly to the persons actually dependent upon the deceased workman, would in many cases be violated.

For extensive notes dealing with the question of dependency under compensation acts in general, see L. R. A. 1916 A 249-254 (Am. Cases) ; Idem., 121-127 (Eng. Cases). For note including decisions of courts and boards, see 9 N. C. C. A. 579-597, also 6 N. C. C. A. 240-287, and 5 N. C. C. A. 613-615.

§ 165. Dependency Defined.

The Rhode Island Supreme Court in *Dazy v. Apponang Co.*, 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594, L. R. A. 1916A (note) 250, said: "The test of dependency is not whether the petitioner, by reducing his expenses below a standard suitable to his condition in life, could secure a subsistence for his family without the contributions of the deceased son, but whether such contributions were needed to provide the family with ordinary necessities of life suitable for persons in their class and position. *Boyd Workmen's Compensation*, § 234; *Main Colliery Co. v. Davies*, 2 W. C. C. 108; *Howells v. Vivian & Sons*, 4 W. C. C. 106. The petitioner is not bound to deprive himself of the ordinary necessities of life to which he has been accustomed in order to absolve the respondent from the payment of damages, nor can he on the other hand demand money from the employer for the purpose of adding to his savings or investments. The expression 'dependent' must be held to mean dependent for the ordinary necessities of life for a person of his class and position and does not cover the reception of benefits which might be devoted to the establishment or increase of some fund which he might desire to lay aside. *Simmons v. White Bros.*, 1 W. C. C. 89."

For similar English definition see *Simmons v. White Bros.*, 1 Q. B. 1005, 80 L. T. 344, 6 N. C. C. A. (note) 241.

In Connecticut, the Court of Appeals in the appeal of *Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245, 9 N. C. C. A. 579 (note) defined dependency as follows: "A dependent under the act is not necessarily one to whom the contributions of the injured or deceased workman are necessary to his or her support of life. The test is whether the contributions



were relied upon by the dependent for his or her means of living, judging this by the class and position in life of the dependent. *Howells v. Vivian & Sons*, 85 L. T. 529; 1 *Bradbury's Workmen's Compensation* 573. Partial dependency may exist, though the contributions be at irregular intervals and in irregular amounts, and though the dependent had other means of support. *Bradbury's Workmen's Compensation*, 574. Dependency is thus in each case a fact to be determined. *Main Colliery Co., Ltd., v. Davies*, 16 T. L. R. 460."

§ 166. Dependency a Question of Fact.

Whether or not any person is the dependent of another is a question of fact to be decided upon by the board and their decision is final unless against the weight of the evidence. *Petrozino v. Am. Mut. Lia. Co.*, 219 Mass. 498, 107 N. E. 370.

In *Hotel Bond Co. Appeal*, 89 Conn. 143, 93 Atl. 245, 9 N. C. C. A. 596, the court, construing a section of the Connecticut act, said: "It conclusively presumes certain persons standing in a certain relation to a deceased employee to be totally dependent, 'in all other cases questions of dependency, total or partial, shall be determined in accordance with the fact, as, the fact may be at the time of the injury' (section 10). Questions of dependency are thus by the act made questions of fact. Had not the act definitely settled this point we should have inclined to this view, both on reason and authority. *Herrick's Case*, 217 Mass. 111, 112, 104 N. E. 432; *Main Colliery Co. v. Davies* (1900), A. C. 358. The ultimate question is the application of the proper standard to the facts found. The court may review the standard applied; it can not review the facts found, except in those instances in which our law permits such review."

Where a person claiming as a dependent is not conclusively presumed to be wholly dependent upon the deceased, it is a question of fact to be determined as of the date of

the accident whether dependency exists. *Miller v. Riverside Storage & Cartage Co.* 155 N. W. 462 (Mich.)

Whether or not a mother and a sister are wholly dependent upon the deceased employee was held to be a question of fact under the Mass. Act. *Petrozino v. American Mutual Liability Ins. Co.* 219 Mass. 498, 107 N. E. 370.

Whenever there is a claim for death of an employee, under the Mass. Act two questions arise: "Was the claimant dependent upon the decedent, and if so what is the amount to be paid the dependent." *Gove v. Royal Indemnity Co.* 223 Mass. 187, 111 N. E. 702.

Under the New York law the decision of the Commission that a mother was dependent upon a deceased workman was conclusive on appeal where it was supported by evidence. *Rhyner v. Hueber Bldg Co.* 156 N. Y. S. 903, 171 App. Div. 56.

Where the Commission has found that the claimants are dependents, this decision is final if there is any evidence to support it. *Hendricks v. Seeman Bros.* 155 N. Y. S. 638, 170 App. Div. 133.

Under the California Act it was held that the question whether non-resident parents of an injured employee were dependent upon him is one of fact for the Board to determine. *Garcia v. Ind. Acc. Comm.* 171 Cal. 57, 151 Pac. 741.

Whether a deceased employee's parents and brothers and sisters were dependent upon him, within the meaning of the New Jersey act, was held to be a question of fact for the judge. *Havey v. Erie R. Co.* 95A 124, 87 N. J. L. 444,

§ 167. "Actual Dependents."

The New Jersey law uses the words "actual dependents." In the case of *Miller v. Public Service Ry. Co.* 84 N. J. Law 174, 85 Atl. 1030, the court of common pleas of Essex County had allowed a claim of 50 per cent of the deceased husband's earnings by reason of the fact that the deceased left not only a widow, but also a father and certain brothers and sisters. The statute provides certain

benefits in case of a surviving widow, or of a widow with children, or of a widow and other dependent relatives. No proof of dependence was offered in the case, but the judge made an award as for a widow and a dependent parent. This the supreme court held to be in error, since the statute provides not for persons nominally dependent, but only for those actually dependent upon the deceased workman for support, and for this reason the finding of the lower court was reversed.

The conclusions of the court are presented in the official syllabus, which is as follows:

"The words 'actual dependents' as used in section 12 of 'An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder,' approved April 4, 1911 (P. L. 1911, p. 139), mean dependents in fact. The contrast in the statute is between those who are actually dependent and those who are not dependent."

§ 168. Burden of Proving Dependency.

In *re King* 220 Mass. 290 107 N. E. 959, the question was whether the burden of proving that the employment was casual was on the insurer or, that it was not casual was on the dependent widow. The commission ruled that it was on the insurer. The court in reversing this ruling said: "The burden of proof however did not shift. *Carroll v. Boston Elevated Railway* 200 Mass. 527. The dependent was required to satisfy the board that the employee's service was such as to entitle her to compensation for his death. *New Bedford v. Hingham* 117 Mass. 445, *Thackway v. Connelly & Sons*, 3 B. W. C. C. 216."

§ 169. When Wholly Dependent.

In the great majority of the states certain persons are named who are presumed to be wholly dependent upon a deceased workman, and in those states all other cases of

dependency in whole or in part are to be determined by the facts presented by each case.

A claimant need not be wholly supported out of an employee's wages in order to be totally dependent, and it is immaterial whether anything was inherited from the employee's estate. *State ex rel Crookston Lumber Co. v. District Court of Beltrami County* 131 Minn. 27, 154 N. W. 509.

An invalid daughter was wholly dependent upon a father, although she had \$100 in cash at the time of his death. *Re Carter*, 221 Mass. 105, 108 N. E. 911.

Invalid parents though owning their own home are wholly dependent upon a son who contributed to their support although a married daughter lived with and gratuitously cared for them. Under this state of facts in *State Ex rel Splady v. Dist. Ct.*, 128 Minn. 338, 151 N. W. 123, L. R. A. 1916A 249 (note), the court said: "It may certainly be argued with some force that one who owns his home, or for whom others perform friendly services, is not technically speaking 'wholly dependent' upon the cash received from the wages of the worker of the family. Nor is one who receives help from a charitable organization, or from neighbors. But we can not suppose that the legislature intended that such a person should be considered only a 'partial dependent.'"

In the following cases it was held that the claimants were wholly dependent: A widowed mother upon a son, *State Ex rel Crookston Lumber Co. v. District Ct.*, 131 Minn. 27, 154 N. W. 509; a daughter upon a father, *Herrick's Case*, 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554; a fifteen-year-old sister upon a brother although the father was alive but in poor health, *Walz v. Holbrook, C. & R. Corp.* 170 App. Div. 6, 155 N. Y. Supp. 703; a mother and sister upon a son, *Caliendo's Case*, 219 Mass. 498, 107 N. E. 370; a mother upon a son, where she had seven children too young to work although the husband was alive and earning \$11 a week, *Krauss v. Geo. H. Fritz & Son*, 87 N. J. L. 321, 93 Atl. 578. A father able to save money after support-

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ing his wife is not dependent upon a son. *Dazy v. Apponang Co.*, 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594. A mother and a brother have been held dependent upon a deceased workman. *Hendricks v. Seeman*, 170 App. Div. 133, 155 N. Y. Supp. 638.

Where a widowed mother is partly dependent upon the wages of a son and partly upon the yield of his land, she is wholly dependent upon him for her support, within the meaning of the Minnesota law. *State Ex rel Crookston Lumber Co. v. District Court of Beltrami County* 131 Minn. 27, 154 N. W. 509.

Under the Wisconsin Act, providing for a reduction of compensation where the injured person is of advanced age, it was held that this reduction did not apply in case of his death where there were surviving dependents. *City of Milwaukee v. Ritzow*, 149 N. W. 480, 158 Wis. 376.

Under the Mass. Act as amended a dependent mother of a deceased engine-horseman killed in the city's employ was held not entitled to compensation. *Devney v. City of Boston*, 220 Mass. 270, 111 N. E. 788.

In *Pinel v. Rapid Railway System*, 184 Mich. 169, 150 N. W. 897, the facts were that Edgar Pinel was killed on May 29, 1913, while in the employment named. He left no widow or children, but a mother, brothers and sisters. The board of arbitration denied the claim of the mother, and the industrial accident board affirmed this decision, whereupon the claimant secured a review of the proceedings by the supreme court. The injured man was not making any contribution to his mother's support, and as he would be under no legal obligation to do so until proceedings were brought against him to compel such contribution, the court held that the mother was not a dependent within the meaning of the law.

§ 170. When Partly Dependent.

Whether or not a person claiming compensation is partly dependent upon a deceased workman is a question of fact to be determined in the manner provided by the act, and

subject to the restrictions, if there are any, as to who may be partly dependent.

Where a deceased minor employee was a member of the family of his half brother who was partially dependent upon him, such half brother was not entitled to compensation as against the surviving father of the deceased minor. In *re Kelly's case* 222 Mass. 538, 111 N. E. 395.

A son turned his wages over to his mother and out of this certain medical attention needed by her was paid. He obtained money from her for his expenditures. It was held that she was partly dependent. *Smith v. National Sash & Door Co.*, 96 Kan. 816, 153 Pac. 533.

The surviving sister of a city employee was held dependent although only partially so. *Kenney v. City of Boston* 222 Mass. 401, 111 N. E. 47.

In *Walz et al. v. Holbrook, Cabot & Rollins Corporation* 170 App. Div. 6, 155 N. Y. Supp. 703, a school girl made a claim as a partial dependent upon a deceased brother who had contributed money to the general support of the family but not to her directly. The court said: "The appellant contends, however, that the sister was not a dependent within the meaning of the statute, for the reasons that the moneys for her support were not paid directly to her individually, by the deceased and that her parents were legally chargeable with such support. If dependent upon the moneys contributed to her support by the deceased, such dependency was not affected by the fact that the moneys were so applied by a person to whom they had been paid by the deceased for that purpose.

. . . The question of dependency is one of fact. The statute does not require that a person shall be wholly dependent in order to be entitled to the death benefit, and the fact that the sister was in part dependent for her support from sources other than the contributions of the deceased, will not deprive her of the benefit of the statute. Actual partial dependency of a person bearing one of the several relationships specified in the statute will suffice."

Although a mother was not completely dependent, at the time of his death upon her son, who contributed to her support, the fact that her advancing age and condition of life would soon make her totally dependent was sufficient to find her partly dependent under the Connecticut act. *Hotel Bond Co. Appeal*, 89 Conn. 143, 93 Atl. 245.

In *Verieke v. City of Grand Rapids*, 184 Mich. 474, 151 N. W. 723, a mother divorced from her husband was held partly dependent upon a son who contributed to her support.

In *Pinel v. Rapid Ry. System*, 184 Mich. 169, 150 N. W. 897, a mother, eighty-three years old, lived on a farm in which she had a life estate. One of her sons lived with her. Another son who did not live with her and did not contribute to her support was injured. It was held that she was not partly dependent on this son. The court said: "The claimant did not belong to the class conclusively presumed by the compensation law to be a dependent. On the date of the accident it is conceded claimant was not dependent by reason of any support furnished to her by the deceased."

For further instances see L. R. A. 1916A 249-254 (Am. Cases); *Idem.*, 121-127 (Eng. Cases); 9 N. C. C. A. 579-597, 6 N. C. C. A. 240-287, and 5 N. C. C. A. 613-615.

§ 171. The Award of a Wholly Dependent Person As a Vested Interest.

Whether or not an award of compensation is a vested interest which passes to the estate of the deceased dependent, is of course subject to the terminology and the whole underlying purpose of each act.

Generally speaking, the theory underlying the passage of most acts was that, on account of the increased number of casualties for which the acts provide compensation, on account of the certainty of payment directly to injured employees, and their dependents in case of death within the acts, and, on account of the greatly increased burden on the employer, that therefore compensation is

a right contingent upon the life of the dependent during the period for which compensation is payable under terms of the act and not a vested right for the benefit of the heirs at law. The theory was that, because under the old system, persons other than those actually dependent upon the deceased employee often benefited by his death, to as great a degree as actual dependents, who in many cases received no compensation at all, therefore under the new system, none but actual dependents should receive compensation, but they should receive it regardless of his negligence, with but few well grounded exceptions.

The case of *Matecny v. Vierling*, 187 Ill. App. 448, sustains this reasoning at least in part. The court said:

"The appellant claims that under section 11 of the act (of 1911) the payments cease upon the death of the dependent person or persons entitled to receive them, and that in the present case the appellant would not be obligated to make any further payments to the administrator after the death of the mother. The appellee contends that, even if it be held that the mother was the sole beneficiary, still her right to the entire compensation became vested upon the death of Joseph Matecny, and the appointment of an administrator for his estate, and that this right would survive her death and inure to the benefit of her estate. After a careful consideration of this question, we have arrived at the conclusion that the contention of the appellant is correct, and that the obligation of the appellant to pay compensation to the administrator would be extinguished on the death of the mother. We do not believe the act contemplates that the employer shall pay any money to non-dependent heirs." This was said under Section II of the Illinois act of 1911 which reads: "Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this act relative to compensation for death received in the course of employment."

But in *State Ex rel Munding v. Industrial Comm.*, the

Ohio court arrived at a different conclusion under the act of that state. After reviewing the parts of the act having a bearing on the question and after citing in support of their conclusion the English cases of *United Colliers v. Simpson*, Appeal Cases (1909) 383, and *Darlington v. Ros-sae & Sons*, 1 K. B. 219, and against it the case of *In re Donovan & Cameron, Swan & Co.*, 2 Ir. R. 633, the Ohio Supreme Court said: "We hold that when the award is once made to a sole dependent the right to compensation vests, and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent."

§ 172. Adults As Dependents on Minors.

In re Murphy 218 Mass. 278, 105 N. E. 635, 5 N. C. C. A. 716, Daniel Murphy instituted proceedings against the Bigelow Carpet Co. and its insurer for compensation for the death of his minor son, Walter Murphy. The boy had earned \$5.67 per week, and contributed all of this to his father for the support of his family, which consisted of the father, mother, and nine children, including Walter. The act provides that in the case of partial dependents "there shall be paid such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the earnings of the deceased at the time of his injury." The industrial accident board found that, although the father was a partial dependent in the sense that he had other income, the earnings of himself and other children, the rule quoted obviously did not apply in such a case, and the amount of compensation should be the same as for a total dependent, in this case the minimum amount permitted by the statute, or \$4 a week, for the 300 weeks specified in the act. The court adopted this view, saying:

"In the present case the father had a large family which he was legally bound to support, and this he was bound to

do, whether the children could help or not. The amount contributed by Walter went to help the father in the support of the whole family. Whether it is wise to distinguish as to the support of the individual members of the family in a case like this, as the insurer suggests, is for the legislature."

In *Boyd v. Pratt et al.*, 72 Wash. 306, 130 Pac. 371, the commissioners had made an award of \$20 per month to his mother from the date of his death until the time when he would have arrived at the age of 21 years. Claim was made in the superior court of King County that as Mrs. Boyd was a dependent, the allowance should be made for the time of her dependency and not for the period of her son's minority. This view was adopted by the court, and on appeal by the supreme court of the State. The compensation act of 1911 provides for a payment monthly to a dependent of a deceased workman in an amount not exceeding \$20 per month. The same section provides that where the deceased is a minor and unmarried, his parents shall receive \$20 per month until he would have reached the age of 21 years. In approving the payments of benefits during dependency the supreme court said:

"We think the interpretation of the statute adopted by the lower court is correct. It is quite clear to us that the legislature must have intended that the first clause quoted should apply to cases of dependency, while the last clause refers only to cases of nondependency. This construction is in keeping with the spirit and object of the law; that is, to protect the injured, and to save dependents from becoming public charges. To hold that an allowance given because of dependency is to be cut off arbitrarily at a time when the deceased would have attained the age of 21 years would defeat the humane purposes of the statute, for the dependency would not then cease, but might continue over a period of years. The second clause seems to have reference to that principle which, under the common law, gave

the same principle. The same principle is applied to every other part of the system.

It is not necessary to have any other principle. The same principle is applied to every other part of the system.

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a parent the right to demand and receive the wages of a minor child."

Section 11 of the Kentucky act makes the minor *sui juris* for the purposes of the act and says: "No other person shall have . . . right to compensation for an injury to or death of such minor employee or for loss of service on account thereof, by reason of the minority of such employee." Therefore it seems that the parent of a minor, although entitled to his earnings at common law, does not have the right to claim compensation for an injured minor child. The child, being for the purposes of this act *sui juris*, should make the claim. Likewise if a minor child is killed as a result of an injury within this act, the parents would not have a right to compensation merely because of infancy, but it would have to be shown that they were actually dependent upon the earnings of this minor child.

In arriving at the amount of compensation due to the dependents of a 16-year-old employee killed in the course of his employment, under the New York act, it was held that the Board could properly consider his probable wage increase. *Kilberg v. Vitch*, 156 N. Y. S. 971, 171 App. Div. 89.

Parents can be dependents of a minor son under the New York act. *Friscia v. Drake Bros. Co.*, 153 N. Y. Supp. 392, 167 App. Div. 496.

A mother was held dependent upon the minor, 18 years of age, within the meaning of the New Jersey act in *Krauss v. Geo. H. Fritz & Son*, 87 N. J. Law 321, 93A, 578.

§ 173. Husband and Wife, Parent and Child.

Usually there is a provision that a wife shall, under well defined conditions, be presumed to be dependent on a husband with whom she was living at the time of his death. Likewise a husband upon a wife, and a child, with limitations as to age and capacity to work, upon a parent with whom it is living. Where such provisions exist, dependency is a question of fact in all other cases not named.

The wording of the particular act must be examined to determine this question.

§ 174. When Husband and Wife Live Apart.

Generally where a husband and wife live apart at the time of the injury causing death, it is a question of fact whether or not the one is dependent upon the other.

Section 13 of the Kentucky act provides that a husband or wife shall be presumed to be wholly dependent upon each other, if at the time of the accident one has not abandoned the other voluntarily, and in the husband's case he must be incapacitated from wage earning in addition. This however would not keep him from proving that he was partly dependent upon his wife.

The Wisconsin statute provides for the same presumption but uses the words: "(a) A wife upon a husband with whom she is living at the time of his death. (b) A husband upon a wife with whom he is living at the time of her death." The effect of this wording makes it very similar to section 13 of the Kentucky act, which is practically the converse of the Wisconsin law. In *Northwestern Iron Co. v. Industrial Comm. of Wis.*, 154 Wis. 97, 142 N. W. 271, L. R. A. 1916A 366, Ann. Cas. 1915B 877, 3 N. C. C. A. 670, the court said: "Proof of total dependency is dispensed with under the statute where the husband and wife are 'living together' at the time of the death of the injured employee. It seems, therefore, quite obvious that the legislature intended by the use of the words to include all cases where there is no legal or actual severance of the marriage relation, though there may be physical separation of the parties by time and distance. The 'living together' contemplated by the statute, we think, was intended to cover cases where no break in the marriage relation existed, and therefore physical dwelling together is not necessary, in order to bring the parties within the words 'living together.' There must be a legal separation or an actual separation in the nature of an estrangement, else there is a 'living together' within the meaning of the statute. This seems to

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be the reasonable and practical construction of the law, and the one which we think the legislature intended. If the law should receive the construction that there must be physical dwelling together in order to satisfy the statute, it is plain that the purpose of the law would in many cases be defeated, because in many cases the spouse may be absent from home for long intervals, although there be no break in the marriage relation, no estrangement, and no intent to separate or sever the existing relation or change the relations or obligations created by the marriage contract."

In the case just above quoted the contention of the company was based on the fact that the widow of the deceased workman was a nonresident of this country, not living with her husband at the time of his death, the employee having left his native country, Austria-Hungary, some three years and three months previously, leaving there his wife and child. He had not visited them, but did occasionally send his wife money. Soon after taking employment with the company he sent \$30 to his wife, saying that if he did not send money every three months she could not make a living. He also sent \$21 in February, exactly three months after the last previous remittance.

In *re Nelson* 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694. The Massachusetts Supreme Court disapproved of the conclusion in *Northwestern Iron Co. v. Ind. Comm.* (supra). The Massachusetts act provides that a wife living with her husband shall be conclusively presumed to be dependent on him. In the present case the wife and husband had lived apart several times for periods of a few months, and at the time of his death had not lived together in the sense of occupying the same house for nearly a year, she being in Nova Scotia during the last six months while he was at work in Boston. There had been no talk of permanent separation or divorce, but she appears to have been largely supporting herself and their child for the year mentioned. Under these circumstances

the court held that they were not "living together" in the sense meant by the language of the statute, and that the industrial accident board should ascertain the extent of dependency as a matter of fact.

The court said:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

'(a) A wife upon a husband with whom she lives at the time of his death.

'(b) A husband upon a wife with whom she lives at the time of her death.

'(c) A child or children under the age of 18 years. . . . there being no surviving dependent parent.

'In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of injury.

'With whom she lives' in (a) means living together as husband and wife in the ordinary acceptation and significance of these words in common understanding. They mean maintaining a home and living together in the same household, or actually cohabiting under conditions which would be regarded as constituting a family relation. There may be temporary absences and incidental interruptions arising out of changes in the house or town of residence, or out of travel for business or pleasure. But there must be a home and a life in it. The matrimonial abode may be a roof of their own, a hired tenement, a boarding house, a rented room or even a room in the house of a relative or friend, however humble or temporary it may be. But it is the situation arising from the existence of a common home, a place of marital association and mutual comfort, broken up or put in peril of hardship or extinction by the husband's death, which is protected by the conclusive presumption of dependency established beyond the peradventure of dispute by the statute. Under such circumstances the widow is given the benefit of an irrefutable assumption that she

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was supported by the husband. The correlative provision in subsection (b) giving the husband the benefit of a like presumption confirms this view. It would seem almost absurd to hold, if conditions had been reversed and it was the husband who was seeking to recover, that he was wholly dependent upon the wife under the circumstances here disclosed. The general purpose of the act supports this conclusion. Workmen's Compensation Acts were founded upon the theory of compensation to dependents when death ensues. This rests upon the fact of dependency. The English Act makes dependency a question of fact in all cases. *Hodgson v. West Stanley Colliery* (1910) A. C. 229; *Potts v. Niddrie & Benhar Coal Co., Ltd.* (1913) A. C. 531. Our Act makes an exception by fixing an absolute presumption of dependency (without regard to what the fact really is) in favor of a wife and of a husband when there is an actual living together. Each is conclusively presumed to be totally dependent upon the other. It might be extremely difficult to measure the extent of dependency where the wife was earning something beside keeping the house and performing the ordinary wifely duties. Therefore our act says that where there is a real living together the fact of dependency shall not be inquired into; it shall be set at rest by a conclusive assumption. It may well be that this was a legislative concession to the recognized benefit to society arising from the living together of husband and wife, and that like concession should not be made to the anomalous situation of a marital relation not accompanied by a living together, leaving the fact of dependency in such cases to be proved as it is in all other cases. There may be many instances where there is a total dependency although there is a temporary separation of husband and wife. There may be a physical dissociation and a breaking up of the home with a definite purpose to resume the normal conditions of married life. The act provides for these cases by requiring dependency to be determined in accordance with the truth. But the words 'living together' do not aptly

describe such a situation. These words are used in antithesis to living apart. They exclude a condition where there is neither a home nor an actual dwelling together, and where the suspension of this relation is something more than a mere temporary incident of a changing family habitation. It seems plain that upon the facts disclosed on this record the decedent and his wife were not living together in the sense in which these words are used in the Workmen's Compensation Act. We are constrained not to follow *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, 3 N. C. C. A. 670, 142 N. W. 271, so far as its reasoning is inconsistent with this conclusion."

The Massachusetts act of 1911, under which the *Nelson* case *supra* was decided, has been amended by an act of 1914, c. 708, § 3, so that now, in regard to the question under discussion it reads: "A wife upon a husband with whom she lives at the time of his death, or from whom at the time of his death the industrial accident board shall find the wife was living apart for justifiable cause, or because he had deserted her. The findings of the board upon the question of such justifiable cause and desertion shall be final."

In *re Gallagher* 219 Mass. 140, 106 N. E. 558, this amendment was construed by the court. Mary E. Gallagher was the widow of an employee who received an injury on December 17, 1912, and died from its effects on January 15, 1913. She had been living apart from him for justifiable cause for about four years, and he had contributed to her support by order of court. She had been obliged, however, to labor and earn a large part of the needful amount. The industrial accident board held that under these circumstances she would be conclusively presumed to be wholly dependent upon her husband, as a wife living with her husband is presumed to be by a provision of the act. On appeal by the insurer this decision was reversed. The court called attention to the fact that since the death of Gallagher the legislature, at the session of 1914, had amended

the act by providing that if, at the time of the husband's death, the industrial accident board shall find the wife was living apart for justifiable cause or because he had deserted her, she is conclusively presumed to be wholly dependent upon her husband, but held that the industrial accident board should determine the question of dependence in the present instance under another clause of the statute, which provides that the award shall be made in accordance with the facts as they existed at the time of the injury.

See also *In re Newman's Case*, 222 Mass. 563, 111 N. E. 359, L. R. A. 1916C 1145.

In *Batista v. West Jersey & S. R. Co.*, 88 Atl. 954, 4 N. C. C. A. 781, under the New Jersey law the facts were that Angelo Batista was killed while employed by the company named, on March 16, 1912, whereupon his widow petitioned for compensation under the act of 1911. It appeared that the claimant had married Batista in 1903, but that she had been abandoned by him about two years later. No children had been born of their marriage, and Batista had subsequently married another woman by whom he had three children living at the time of this proceeding. It was represented that while he was living with this family, the woman was not his lawful widow, nor were she and her children entitled to compensation under the act. The rights of these persons were not considered in the instant proceedings, but as to the claimant the court held:

"She was not an actual dependent within the meaning of the twelfth section of the workingmen's compensation act (P. L. 1911, p. 139). *Miller v. Public Service R. Co.*, 85 Atl. 1030, decided by this court at the February term, 1913, is controlling. The petitioner not being an actual dependent, the judgment was not warranted by the facts presented."

Under the Michigan act a wife who voluntarily left her husband and went to another state and became a school teacher, which business she followed before marriage, it

was held that she was not a dependent of the workman who was killed. *Finn v. Detroit Mt. C. & M. City Ry.* 155 N. W. 721 (Mich.)

Under the English act the question of the dependency of a wife not living with her husband at the time of the injury causing his death is wholly a question of fact. *Medler v. Medler* (Eng.) 1 B. W. C. C. 332, *Coulthard v. Consett Iron Co.* (Eng.) 2 K B. 869. For further cases under the British act, see L. R. A. 1916A (note) 370-371.

§ 175. Marriage As Affecting Dependency.

A woman who had gone through a marriage ceremony and mistakenly believed that she was the lawful wife of a workman, was held not to be "a member of the family of the deceased" or entitled to compensation on account of his death. *Armstrong v. Ind. Comm. of Wis.* 161 Wis. 530, 154 N. W. 844.

A woman had entered into a common law marriage in Ohio, where such marriages were valid, and moved to California where both had at all times represented themselves as husband and wife. The husband was killed under the California act and the wife was held entitled to compensation as his widow. *Hill v. Fuller & Co.*, 1 Cal. Ind. Acc. Comm. Dec. 155. To the same effect see *In re Mary A. Gloyd*, Vol. 1, No. 7, Bul. Ohio, Indus. Com. 79.

A woman living as a bigamous wife without her knowledge was held dependent upon the workman who had married her and supported her. *Rossi v. Standard Oil Co.* 2 Cal. Ind. Acc. Comm. Dec. 307. To the same effect see *In re Elizabeth A. Jones*, Vol. 1, No. 7, Bul. Ohio, Indus. Com. 187.

§ 176. Alien Dependents.

It is not necessary for an employee to be a citizen of the United States in order that he or his dependents, residing in this country, may recover the full benefits of the act. But under the Kentucky act if he has no dependents resident in this country, then one-half of the benefits allowed

to resident dependents will be paid to the alien dependent widow and children, L. 1916, c. 33, § 14. But these two are the only alien dependents recognized by the act.

In so far as alien dependents are concerned future payments may be commuted to the then value thereof and paid in a lump sum.

The acts of Connecticut, New Jersey and Washington have somewhat similar provisions.

An alien is one born out of the jurisdiction and allegiance of the United States and who has not been naturalized under the constitution and laws of the United States or any one of them. 2 Kent's Com. (13th ed.) 50; 1 Bouv. Inst., § 163; 2 Am. & Eng. Ency. 64. The statutes of each state usually provide who shall be citizens.

In *Petrozino v. Am. Mut. Liability Ins. Co.* 219 Mass. 498, 107 N. E. 370. Florinda Petrozino, instituted an action under the workmen's compensation act, as administratrix of a deceased workman. The decree in the superior court having been in her favor, the insurer appealed and raised the point that the mother and sister of the workman were not wholly dependent upon him. This contention was rejected and the decree affirmed, as indicated in the following quotation from the opinion:

"The evidence shows that they are residents of Italy, and having become unable by reason of failing eyesight to follow their usual occupations were forced to rely wholly upon him for the means of subsistence. The insurer, however, contends, that the 6 or 7 cents a day earned by another sister who was a member of the family, and the remittances from time to time to the mother of various sums by an aunt of the decedent were sufficient to take the case out of the statute. But the findings, that the remittances were mere gratuities, and that the pittance earned by the sister was hardly sufficient for her own maintenance, and that no part was paid to the dependents who never relied upon either for aid, eliminates those relatives as contributing and dependable sources of support. It being plain on

the facts that during his life the mother and sister had no other source of income except his earnings, they were rightly found to be wholly dependent upon the employee, and the rulings requested could not be given."

A foreign consul can receive money due citizens and residents of his country under the Ohio act, unless a power of attorney has been given to some other person. *Vujic v. Youngstown Sheet & Tube Co.* 220 Fed. 390.

Under the New Jersey act it was held that the administrator of an employee whose dependents were non-resident aliens, could not maintain an action for the death of the employee under the New Jersey Act. *De Biasi v. Normandy Water Co.* 228 Fed. 234.

Consuls or vice consuls may interpose claims for aliens but they cannot receive property without a specific authority from the particular individual who is entitled to it. *The Bello Corrunes 6 Wheat (U. S.)* 167.

A wife and infant son residing in Austria-Hungary were entitled to compensation under the Ohio act for the death of the husband and father injured in Ohio. *Vujic v. Youngstown Sheet & Tube Co.* 220 Fed. 390.

Under the English act the nonresident widow of an alien workman was entitled to compensation. *Krzus v. Crow's Nest Pass Coal Co. Ltd.* 6 B. W. C. C. 271.

This is true under the Illinois act of 1913, *Victor Chemical Works v. Ind. Bd.* 113 N. E. 173 (Ill.) But, because of a statutory provision is not true under the New Jersey act of 1911, *Gregutis v. Waelark Wire Works*, 91 Atl. 98 (N. J.).

§ 177. Effect of Marriage of Dependent.

Under the Kansas and Kentucky acts if a person is receiving compensation as a dependent and marries, the compensation at once ceases as to that person. Upon reason and principle this should be the general rule, although no authority has been found to support it.

§ 178. Effect on Dependents of Imprisonment of Workman.

In *Boyd's Workmen's Compensation*, Vol. II, § 536, it is said: "In a case where an injured workman receiving

weekly compensation was convicted and sentenced to imprisonment for a specified time and the employer claimed that the incapacity to earn wages was no longer due to the accident and claimed a suspension of weekly payments, the court held that the workman was not entitled to receive his entire weekly earnings while in prison, but that a portion of the compensation should be paid for the support of his children during the time of his incarceration. *Clayton v. Dobbs*, 2 B. W. C. C. 488."

§ 179. Effect on Dependents of Release Given by Employee.

The fact that the employee during his lifetime gave the employer a release in full of all claims under the Workmen's Compensation Act does not defeat the claim of his dependents if death follows within limitations, resulting from the injury. The act sets up two separate rights to claim compensation, one in the employee himself and the other in his dependents.

In *Milwaukee Coke & Gas Co. v. Industrial Commission*, 160 Wis. 247, 151 N. W. 245, 9 N. C. C. A. 597, where this question was up for decision, the court said the release did not affect the claim of the dependent, "because when an employee with dependents is injured by accident and temporarily disabled for a period exceeding a week, and subsequently dies as a result of his injuries, the Workmen's Compensation Act undoubtedly contemplates the existence of two distinct claims for indemnity, one by the employee himself for his temporary disablement, and one by the dependents for his death, neither of which claims can be discharged by the owner of the other claim."

The facts of the case just quoted were as follows:

The company named brought action against the industrial commission and Pauline Dixon to set aside an award of the commission in favor of Mrs. Dixon. This award was of the sum of \$3,000 as compensation for the death of her husband, Thomas Dixon. He was an engineer on a switch engine, and when relieved at 7 o'clock on the evening of March 23, 1912, started to ride back to the office on the

apron between the engine and tender. He fell off, and suffered injuries which the physicians diagnosed as arising from concussion of the brain. He was at this time incapacitated for eight days and was paid \$1.56 by the company, which was the exact amount to which he was entitled for the temporary disability under subsection 2 of section 2394-9 of the statutes, for one day more than the week which he had lost. At this time he executed a release of all claims. After working a large part of the time until the following October, he became ill again, and died December 15. The medical testimony was conflicting, but the court held that there was evidence to sustain the findings of the commission that the occurrence constituted an industrial accident, and that the death was the result of it. The court further held that the release was of no validity in barring the widow's right to compensation for two reasons: First, because, there being no dispute that the small amount paid Dixon was the exact sum due for the temporary disability, there was no consideration for the release of any other claim; and second, as above set out, because the circumstances gave rise to two distinct claims, one belonging to the employee himself, and the other accruing on his death to the dependents, and he could not personally release the latter.

In *re Cripp*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B 828, it was held that when a widow was the sole dependent, she alone could discharge her right to compensation and this was not affected by a settlement for the injuries made by the employee with a third person previous to his death.

In *West Jersey Trust Co. v. P. R. R. Co.*, 88 N. J. Law 102, 95 Atl. 753, it was contended that the claim of two infant dependents suing for the benefits of the act by a guardian on account of the death of the father, was barred because of a release executed by the father in his life time and contained in his application for admission into a railroad relief association, and was further barred by a release by their mother on receipt of the death benefit from said as-

sociation. It was held that neither the release of the decedent nor the dependent widow, barred the claim of the dependents under the act. The court saying: "The release is made by the widow 'qua' widow, and of course can not bind the personal representative of the deceased who sued by right of statute."

§ 180. Payments to One Dependent for the Benefit of Others.

Generally the purpose of the act is to provide at least a partial support to those who were actual dependents of a deceased workman, so as to enable them to maintain the family in the home. Thus as far as payment of compensation is concerned, dependents, where there is a surviving parent and children in the same home, are considered collectively. Generally when one dependent is entitled by law to receive compensation for all a receipt from that dependent is binding upon all.

Where a deceased employee left a wife and children under 18 surviving him, payments allotted to the infant children should be paid to the surviving wife. *Woodcock v. Walker*, 155 N. Y. S. 702, 170 App. Div. 4.

When there is a dependent mother and non-dependent brothers and sisters, compensation is to be awarded to the mother alone. *Matecny v. Vierling Stat. Works* 187 Ill. App. 448.

In *re Employers' Liability Assurance Corpn. (McNicol)* 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306, 4 N. C. C. A. 522, on the point as to the beneficiaries to whom payment should be made, the supreme judicial court reversed the superior court and the board of arbitration, and sustained the findings of the industrial accident board that the widow alone was entitled to payment. The statute provides for a conclusive presumption of the dependence of a wife upon a deceased husband, and also of children under 18 years of age upon the deceased parent with whom they were living at the time of his or her death "there being no surviving dependent parent." It was held that "the natural

meaning of this sentence is that the conclusive presumption of dependency of children is conditioned upon the non-existence of a surviving dependent parent." From this ruling it followed that the decree of the superior court dividing the benefits between the mother and the child must be reversed and a new decree entered giving the payments entirely to the mother.

The case of *Sexton v. Newark Dist. Telegraph Co.*, 84 N. J. Law 85, 86 Atl. 451, 3 N. C. C. A. 569, was first appealed on the ground that the New Jersey act of 1911 was unconstitutional. This point was overruled in the above opinion and the case returned for a hearing on the merits. The opinion from which quotations are given below was the opinion of the lower court which was affirmed without comment in 86 N. J. Law, 701, 91 Atl. 1070.

The court, first cited the provisions of the statute which define dependency, and which declare a conclusive presumption in favor of a wife living with her husband at the time of his death, and of a child living with the parent at the time of his death, there being no surviving dependent parent. The conclusions of the court are set forth in the following quotations from the opinion of Judge Rugg.

"It is plain from this provision that the widow is conclusively presumed to be wholly dependent. It is equally plain that the child of the former marriage also is conclusively presumed to be wholly dependent, because in her case there is no surviving dependent parent. This language as construed in the *McNicol* case, 102 N. E. 697, means that the children of the deceased who are the children of the widow are not conclusively presumed to be dependent, because as to them there is a surviving parent.

Reading the section as a whole the purpose appears to be, though disclosed not in the clearest language, to divide the payments equally among those conclusively presumed to be wholly dependent. This is manifest by express words when there are two or more orphaned children. Equal division is provided also when, in case there is no one con-

clusively presumed to be wholly dependent and dependency is determined as a fact, more than one is found to be wholly dependent. This interpretation may be supported as consonant with what reasonably may be supposed to have been the intent of the legislature.

It is argued that the widow is entitled to the whole sum on the ground that she stands in loco parentis. These words are not found in the act. The voluntary assumption of the obligations of parenthood toward children of a spouse by another marriage is one favored by the law. They may be included under the descriptive word 'family.' (*Mulhern v. McDavitt*, 16 Gray, 404.) But there is nothing in the record at bar to show that the widow has assumed any legal obligation to support the stepdaughter. On the other hand it is agreed that she declines to contribute anything to the guardian on whom by law is cast the duty of her care. Parent commonly means the lawful father or mother by blood. It does not lend itself readily to significance so broad as to include stepfather or stepmother, or anyone standing in loco parentis. The use of such other words in common speech of itself has some tendency to indicate a different meaning. The arrangement of the words 'parent' and 'child' in the present act point to the consanguineous relation, and not to that by affinity. That it does not include one standing in the place of a parent seems to follow from the circumstance that there is no continuing obligation on one who has assumed such a relation. It may be abandoned at any time. The result is that there should be an equal division between the widow and the daughter of the earlier marriage who has no surviving parent."

§ 181. Payments to Supposed Dependents.

Under the Kentucky act if the employer after a reasonable investigation has been paying compensation to the dependent whom he believed was entitled to it, such payment made in good faith will discharge his liability up to the time he receives notice in writing from one claiming to be the lawful dependent. The employer can attempt if

he desires to determine which of the claimants is entitled to compensation. But he will not be discharged from payments made after notice if he should decide incorrectly. Application to the board for a decision will automatically stop compensation until a decision is rendered and payment in accordance with the board's decision will relieve the employer of all other liability.

The claimant may, after written notice to the employer, file an application with the board for a hearing, setting up the facts which he thinks establish his prior right as dependent over the person at that time receiving compensation.

If the decision of the board is appealed from, the person or persons entitled to compensation as a result of the board's decision must give bond for the protection of adverse claimants pending the outcome of the proceedings. The employer need not pay compensation in case of the failure of the successful claimant to furnish bond.



CHAPTER VII

TREATMENT OF INJURIES

Section.

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§ 182. Reasons Underlying Provisions for Medical Attention.

Practically all of the acts require the employer to furnish treatment for injuries within certain limits as to time and amount. The reasons why the employer is required to furnish the medical service are that he is generally better able to judge the efficiency of the physician or surgeon than the injured man, and because treatment for injuries is one of the hazards of business, the cost of which the acts throw on the employer. It is also to his interest to furnish the very best medical and surgical care for the injured employee in order to minimize the result of the injury and to

secure an early recovery, and in this manner he gains complete knowledge of the condition of the injured man, which he is entitled to inasmuch as he is paying compensation. *City of Milwaukee v. Miller*, 154 Wis. 652, 144 N. W. 188, 4 N. C. C. A. 149, L. R. A. 1916A 1, Ann. Cas. 1915B 847; *In re Panazuk* 217 Mass. 589, 105 N. E. 368.

§ 183. First Aid.

This term has a definite meaning which has grown up by reason of its use under employers' liability insurance policies, but that meaning does not necessarily apply here. As used in some of the acts it means that in an emergency the injured employee, and perhaps a stranger in his behalf, may call a physician for the first attention. This doctor is paid out of the allowance for complete attention, but the employer generally has the right either to retain the doctor for the subsequent treatment, or to call in another of his own choice.

§184. Employer Must Furnish Medical Aid, Etc., Meaning.

In re Panasuk, 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688, the above question was considered:

The Massachusetts compensation act provides for the furnishing by the insuring association, during the first two weeks after injury, of medical and hospital services and medicines. The employee concerned was at work for the Taunton Wool Stock Co., and a splinter became embedded in his hand, causing an abscess and necessitating a surgical operation and several dressings thereafter. The industrial accident board found that the employee was an illiterate foreigner, unable to read, write, speak or understand the English language. A notice, signed by the Taunton Dye Works & Bleachery Co., a separate corporation from that for which the employee worked, was posted near his working place, giving the name of the insurance association and the names of "Doctors to whom to go in case of accident and receive free medical attendance." The employee reported his injury to the foreman, who did not advise him regarding

his right to medical attendance, and he went to a physician, who found need of an immediate operation. The physician wrote to the superintendent of the employer, which did not then furnish any attendance. It was held that the industrial accident board had jurisdiction to consider the question of the right of the employee to compensation for the amount paid by him for medical attendance; and that the duty of the association to "furnish" medical treatment means something more than a mere passive readiness to provide it if called for; rather, an active effort to render the necessary aid. The court said:

"The obligation to furnish medical and hospital services for the first two weeks after the injury is imposed on the insurer by the express words of the act. This duty must be performed or reasonable efforts made to that end before the statutory obligation is satisfied. 'Furnish' means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives 'a personal injury arising out of or in the course of his employment.' Such a person is manifestly presumed by the act to be under more or less physical disability and hence not in his normal condition of ability to look out for himself. The word 'furnish' in this connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required service must of course be made. Then either express notice must be given to the employee or there must be such publication or posting of the information as warrants the fair inference that knowledge has reached the employee. If the insurer has made adequate arrangements for the care of those to whom the duty is owed in the event of injury, and then by conspicuous notices suitably posted in places frequented by the employee in a language capable of being read by him, has given full information of that fact,

and directions as to steps to be taken by an injured person in order to avail himself of these arrangements, a very different question would be presented. This might go a long way toward proving compliance with the requirement of the statute."

**§ 185. When the Employer Can Select His Own Physician—
When the Employee.**

In *Massachusetts Bonding & Ins. Co. v. Pillsbury et al.*, 170 Cal. 767, 151 Pac. 419, 11 N. C. C. A. 426 the court said:

"Under section 15 (a) of the act, the employer is required to provide such 'medical surgical and hospital treatment . . . as may be reasonably required at the time of the injury and within ninety days thereafter' and in case of his neglect or refusal seasonably to do so he is liable for the reasonable expense incurred by or in behalf of the employee in providing the same. . . . It may be conceded for the purpose of the argument that under these provisions the employer has the right, in the first instance, to designate the physician or surgeon who shall attend the injured man, and that if the latter, without any reasonable ground, refuses to accept the services of such physician, the cost of procuring medical treatment is upon him. It may also be conceded that when insurance is effected under the act and after proper notice, the insurance carrier has all the rights of the employer in this regard. Here, however, there is evidence that Taylor was dissatisfied with the advice given him by the surgeon first selected by the insurance company, and after he had communicated his dissatisfaction to the company he was directed to go to another surgeon. Finding that the surgeon thus suggested by way of substitution was out of town he went to his family physician for treatment. While the company might have been entitled to insist upon its first selection, the commission was authorized, under the evidence, to conclude that this right had been waived. Taylor on finding that the surgeon last des-

the morning of the 24th, the 25th, and the 26th, the weather was very fine, and the wind was light. The water was very calm, and the sky was very blue. The sun was very bright, and the air was very fresh. The people were very happy, and the children were very noisy. The birds were very loud, and the flowers were very pretty. The trees were very green, and the grass was very soft. The water was very clear, and the sand was very white. The sky was very blue, and the clouds were very white. The sun was very bright, and the moon was very full. The stars were very bright, and the planets were very visible. The weather was very good, and the day was very nice.

After the first three days, the weather was not so good. It was very hot, and the wind was very strong. The water was very rough, and the sky was very cloudy. The sun was very bright, and the air was very hot. The people were very tired, and the children were very bored. The birds were very quiet, and the flowers were very dry. The trees were very brown, and the grass was very dry. The water was very dark, and the sand was very hot. The sky was very grey, and the clouds were very dark. The sun was very hot, and the moon was very small. The stars were very dim, and the planets were very invisible. The weather was very bad, and the day was very hot.

After the fourth day, the weather was very good again. It was very cool, and the wind was very light. The water was very calm, and the sky was very blue. The sun was very bright, and the air was very fresh. The people were very happy, and the children were very noisy. The birds were very loud, and the flowers were very pretty. The trees were very green, and the grass was very soft. The water was very clear, and the sand was very white. The sky was very blue, and the clouds were very white. The sun was very bright, and the moon was very full. The stars were very bright, and the planets were very visible. The weather was very good, and the day was very nice.

The following day, the weather was very good. It was very cool, and the wind was very light. The water was very calm, and the sky was very blue. The sun was very bright, and the air was very fresh. The people were very happy, and the children were very noisy. The birds were very loud, and the flowers were very pretty. The trees were very green, and the grass was very soft. The water was very clear, and the sand was very white. The sky was very blue, and the clouds were very white. The sun was very bright, and the moon was very full. The stars were very bright, and the planets were very visible. The weather was very good, and the day was very nice.

ignated was not at hand, was not bound to wait indefinitely until he should return. The commission did not exceed its power in finding as it impliedly did, that the injured man acted upon reasonable and proper grounds in seeking the services of his own physician."

Under the New York act the employee can not select his own physician unless the employer refuses or neglects to provide one. *Keigher v. General Electric Co.* (New York) 173 App. Div. 207.

§ 186. Change In Treatment.

If the employer is not giving the injured employee the kind of medical, surgical and hospital treatment that the nature of the injury demands, he may usually go to a physician of his own choice at the employer's expense. *Vaughn v. American Coal Co.* 1 Conn. Comp. Dec. 617. If the employer thinks the workman will not receive the proper treatment from a physician of his selection the employer, or insurer, can demand a change of physicians, so long as he makes this demand within a reasonable time after the first treatment has been given. *Bassett v. Graf Elder Co.* 1 Cal. Ind. Acc. Comm. Dec. 60.

§ 187. Medical, Surgical or Hospital Fees.

The Kentucky act provides that these fees "shall be fair and reasonable, shall be subject to regulation by the board and shall be limited to such charges as are reasonable for similar treatment of injured persons of a like standard of living in the same community and where such treatment is paid for by the injured person himself. In considering what fees are reasonable the board may also consider the increased security of payment afforded by this act." § 6 Chap. 33 Ky. Laws 1916. The acts of New York, Vermont and Oklahoma have similar provisions.

It has been held that a physician can not recover for services to which the employee is already entitled by reason of membership in an organization furnishing medical attention free to its members. *Mahan v. Frankfort General Ins. Co.* 2 Cal. Ind. Acc. Comm. Dec. 530.

Under the California act it was held invalid for the board to direct an award of a physician's fee to the person entitled to receive it, without fixing the amount of the fee or naming the person. *Pacific Coast Casualty Co. v. Pillsbury* 171 Cal. 319, 153 Pac. 24.

Under the California act an award ordering the payment of medical bills, subject to the approval of the commission, was held not to be a final judgment subject to review on certiorari. *Garrett-Callahan Co. v. Industrial Acc. Comm.* 171 Cal. 334, 153 Pac. 239.

§ 188. Physicians' Charges Based on Employee's Ability to Pay.

In *City of Milwaukee v. Miller et al.*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A 1, Ann. Cas. 1915B 847, 4 N. C. C. A. 149, Henry Miller was employed by the city of Milwaukee as a laborer, and suffered an injury requiring the amputation of one of his great toes. There was infection and a slow recovery. Miller resided with relatives, a niece and her mother, the former of whom voluntarily acted as nurse without promise or expectation of compensation. The statute provides that for not exceeding 90 days from the date of the injury the employer shall furnish medical and surgical treatment, etc., such "as may be reasonably required." Miller was injured about October 1, 1912, and only notified the city of his injury some three weeks thereafter. He never notified the city of his needs of medical attendance, but had employed one Dr. Bradstad to treat him on the day of the injury, and continuously thereafter for the full period of 90 days. On November 17 the city voluntarily tendered Miller the services of Dr. Carroll, a competent physician, but these services were not accepted, and Dr. Bradstad continued in attendance some six weeks longer, Miller knowing that the city was ready at any time to furnish him the privileges of its physician. The record showed 135 visits and treatments by Dr. Bradstad during 90 days, and this physician verified the reasonableness of his own bill. Dr. Carroll, under oath, condemned it, stating

that \$50 or \$75 was ample for such a case. The industrial commission, on hearing, allowed the full claim of the physician, amounting to \$222, also \$32 for a nurse, \$5 for bandages and supplies, and \$172.50 for disability allowance. The city brought an action in the circuit court of Dane county to test this award, but it was sustained in that court. The city then appealed, securing a modification of the award by eliminating the amount allowed for medical attendance and nurse. The court said in part:

"In the light of the foregoing it would seem that such a situation as the one presented by the claim for physician's services in this case should be viewed with eyes blinded, so to speak, to the competency of the party claimed of to pay, and without a thought that the latter can legitimately be mulcted as a wrong-doer, in the moral sense, or should be required to pay more or less according to wealth, situation or status. Results should not afford any good reason for apprehending that those influences popularly supposed to formerly have unduly characterized recoveries by jury interference still play an efficient part. The directly responsible party should be regarded as voluntarily joining with the injured person in submitting to the sound judgment of impartial men the question of how much, under the circumstances, by legislative standards, should be rendered by one to the other as reparation for his loss.

Manifestly, in case of a claim such as the one in question, the amount allowed should not be more merely because of a municipality being directly responsible than in case of the person treated having to bear the burden. What services were reasonably necessary and what is a fair compensation therefor, are the only legitimate inquiries. In case of grave doubts as to the amount and the truth of the matter resting as here, solely on the word of the interested party, opposed by the evidence of another competent to testify and of little or no interest in the result, there should be much hesitation, and generally refusal, to resolve it wholly against the party from whom the recovery is sought. The burden of

proof should be regarded as on the claimant to establish his claim with reasonable certainty, and circumstances or evidence impairing such certainty should incline triers to reduce the amount claimed sufficiently to place it safely within the boundaries of reason.

It will be noted that there were two visits and two dressings nearly every day for the first 60 days. That most of such service could have been efficiently performed by any fairly intelligent attendant under the directions of the physician, he being easily within reach in case of there being any special reason for his presence, needs no evidence other than our own common sense and common experience in life. It must be remembered that trial tribunals are not, necessarily, bound by the testimony of experts merely because of their special knowledge. One who by reason of such knowledge is competent to give opinion evidence may deal in such exaggerations, especially when they favor his selfish interests, as in this case, as to render his evidence of little or no value, even when unopposed by evidence from the mouth of any other witness. (*Baxter v. C. & N. W. Ry. Co.*, 104 Wis. 307, 331, 80 N. W. 644; *Bucher v. Wis. Cent. R. Co.*, 139 Wis. 597, 120 N. W. 518.) It has been often said that opinion evidence is not conclusive in any case; that if it is not within the scope of reason and common sense it should not be regarded at all. Triers circumstanced like the industrial commission, have a right and duty to apply their own common sense and experience to such a situation as existed here and not to allow a claim which appears manifestly exorbitant merely because verified by the person to be benefited by its allowance. No more should have been allowed in this case than would appear to a reasonable certainty fair in case of the injured man being responsible for payment without any right to reimbursement."

§ 189. Employer Must Have Knowledge of Injury and Reasonable Opportunity to Furnish Treatment.

In the City of Milwaukee v. Miller et al., 154 Wis. 652,

144 N. W. 188, L. R. A. 1916A 1, Ann. Cas. 1915B 847, 4 N. C. C. A. 149, Miller did not notify the city of his injury until three weeks after it occurred and had already employed his own physician, who presented an exorbitant bill. At a reasonable time after notice the city offered the services of their physician, which offer was refused. In holding that the man could not recover for his physician's bills against the city, the court said:

"Thus, the burden for all reasonable medical aid and surgical treatment, medicine, etc., is cast on the employer, limited as to time, with the very wise and necessary safeguard against imposition that the choice of the medical or surgical attendant shall be left with him and that, if the injured person unnecessarily chooses his own physician, he will do so at the peril of having to bear the burden of the expense. That is a very valuable protection to injured persons as well as to employers. The natural effect of a firm enforcement of it will be to expedite the return of honest claimants to the walks of industry and prevent them from having their misfortunes exploited for others' benefit. If the advantages to be gained by a firm administration of such provision would be greater on one side than on the other, it is the side of the employees. Therefore, in case of a personal injury to an employee in the line of his duty, the law should be construed and applied so as to secure to his employer reasonable opportunity to conserve the mutual interests of the two parties to the misfortune by supplying the medical and surgical needs of the injured.

The logic of the foregoing is plainly this: It is the duty of an injured employee who needs, or supposes himself to need, medical and surgical treatment to give his employer reasonable notice thereof. The privilege of the latter, necessarily, implies the right to reasonable opportunity to exercise it. Such opportunity should ordinarily be accorded by the act of the injured man, not secured by the employer, keeping in his service a physician and surgeon charged with the duty of discovery. Note, that the em-

ployer is not made liable for the reasonable expenses incurred by or on behalf of the employee in providing medical aid and surgical treatment, except in case of 'neglect or refusal seasonably to do so.' This language, as indicated, by necessary inference, implies that he shall have reasonable notice of the employee's need of treatment and desire and willingness for him to act in the matter. The idea indulged in below that the provision casts a duty on the employer of active vigilance to discover the necessities of injured employees, such as by keeping a physician and surgeon constantly employed and on the alert to make discoveries, we do not find in the law in letter or spirit. On the contrary, we find such idea plainly negatived by the language and purpose of the enactment. The legislature, certainly, never dreamed of casting any such burden on employers as that suggested by the commission in its decision. To give the law the contrary cast by administration would defeat one of its most valuable safeguards and open up a very inviting field for the medical profession to win discredit—one which doubtless its members, having high ideals, would gladly have closed, and which justice to employer, employee and the public demands shall be closed.

The result is that Miller, since he failed to notify his employer of his needs, never had competency to employ a physician at the expense of the city of Milwaukee, except for such reasonable length of time as necessarily intervened between his injury and reasonable opportunity after due notice for the city to exercise its privilege. The time could not have been long. How long it is impossible to determine from the record. It is quite certain that Miller voluntarily selected Dr. Bradstad to treat him—not knowing, probably, of the municipality's privilege in the matter. That is his misfortune and, however much it may be regretted, it is far better that the integrity of the law be not invaded than that it be impaired in the slightest degree in the particular instance to avoid the consequence of his not knowing or appreciating its requirements."

§ 190. Nursing, Where Not Specified, Included in "Medical and Surgical Treatment."

In *city of Milwaukee v. Miller, et al.*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A 1, Ann. Cas. 1915B 847, 4 N. C. C. A. 149, it was said:

"The services of the nurse for which \$32 was allowed were rendered during the first four weeks after the injury. It is noticeable that, notwithstanding Dr. Bradstad visited his patient twice each day for some forty days thereafter, the recovery had so far progressed that services of a nurse were considered unnecessary. The scheme of the legislature included definite specifications of just what burdens an employer shall bear for the benefit of his injured employee. No mention is made in such specifications of services of a nurse during the first ninety days. Therefore, compensation of that sort must be regarded as not within legislative contemplation, except as included in the term 'medical and surgical treatment . . . reasonably required.' It has become so common for a physician or surgeon to have a nurse as his assistant, in cases requiring attention at shorter intervals than he can well be present, that the major service may well be regarded as including the minor attention, in all cases where a nurse is employed by the physician or surgeon, or by his direction, and the services are an incident of the treatment; and that would obtain whether the medical or surgical attendant is engaged by the employer and employee. In neither case is there any warrant in the law, as it seems, for allowing compensation for services of a nurse, other than incidental to medical or surgical attention, during the ninety days immediately succeeding the injury."

It has been held in California that the employer is only liable for the services of a nurse when the attending physician, authorizes, requires or consents to such treatment. *Hughes v. Degen Belting Co.*, 1 Cal. Ind. Acc. Com. Dec. 203.

§ 191. Nursing Gratuitously by Members of Household Not "Reasonable Expense Incurred."

In *City of Milwaukee v. Miller et al.*, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A 1, Ann. Cas. 1915B 847, 4 N. C. C. A. 149, the court said: "What has been said, sufficiently for the case, disposes of the claim for services of a nurse; but another reason is advanced why the allowance should not have been made here under the circumstance that the service was voluntarily performed by a relative of Miller, who resided in the house with him, without promise or expectation of compensation. The fact that she was a minor makes no difference. Whatever she did was done substantially in the presence of her mother and evidently with the latter's sanction. As the mother was a nearer relative of Miller than the niece who performed the service, if the question whether the attention is compensable as a legal liability, be referable to the attitude of the former, the inference is all the stronger that the same was intended to be gratuitous."

The court then suggested that the commission "probably applied the rule in negligence cases that he who is liable for damages for a tortious act can not mitigate the amount of the recovery by taking advantage of the gratuitous service or loving care of friends" in awarding compensation for the nursing of this girl, and concluded as follows:

"This extreme and rather harsh rule is characterized by a penal element, grounded on the moral turpitude of the wrongful act. Under the statutory system for dealing with personal injury losses incident to performance of the duties of an employer, they are regarded as mutual misfortunes to be charged up, as directly as practicable, to the cost of production. The right to have the employer regarded as an agency to make payment to the employee and absorb the same as an expense of the industry, regardless of whether the loss is attributable to any human fault, is a legislative creation within the constitutional exercise of the police power to legislate for the public welfare. It is not charity

but the recognition of a moral duty and the erection of it into a legal obligation of the public, not of the mere employer, to compensate, reasonably, those who are injured while in the employment of others, as a part of the natural, necessary cost of production; that obligation being discharged through the agency of the employer.

Thus the reason of the old rule applicable to wrongs does not furnish any sound basis for allowing compensation for the services of a nurse under the circumstances of this case. The beneficence of the law in recognizing moral duty, goes no further than its specifications, read in the spirit of the enactment. That does not go to the extent of mulcting, indirectly, consumers to compensate for services gratuitously performed in taking care of injured persons. It is confined to the reasonable expense incurred by or on behalf of the employer in providing the specific elements of relief mentioned in subdivision 1, sections 2394-9 of the statute; giving to the words 'reasonable expense incurred' their fair meaning, in the light of the system the legislature created. 'Reasonable expense incurred' should be viewed from the standpoint of the injured person, where reasonably necessary, being, by law, the agent of the employer to act in their mutual interests in incurring the expense—the possessor, so to speak, of a power in trust and in duty bound to act fairly for both parties. The more clearly it is appreciated that the basic logic of the law is mutuality of interest between employers, employees and the public, and that each actor is charged with the duty of promoting the mutual interests, the more apparent the high ideal the legislature had in mind in creating the new system, and the greater the prospect of such ideal being realized. Nothing short of reasonable expenditure of money, or incurring of legal liability to expend money for the purposes contemplated in the act, can be held to satisfy the legislative conception of 'reasonable expenses incurred,' as the words were used in the act. The services of a nurse in this case obviously do not fall within such meaning."

§ 192. Reasons for Privilege of Physical Examination.

An employer has the right to demand that the employee submit himself to physical examination by duly qualified physicians or surgeons at reasonable times and places under reasonable conditions, so long as the employee is claiming compensation. The employer must bear the expense of the examination, but the employee may pay his own physician and have him present. If the employee refuses to permit examination or obstructs it compensation payments are lapsed during the period of refusal.

The compensation act does away with negligence and requires the employer to pay the benefits of the act for all injuries by accident arising out of and in the course of employment. This naturally increases the burden of the employer. He is also bound to furnish proper medical and surgical treatment. The act speaks in terms of disability and the employer pays on the same basis. Therefore, he is given the right, under reasonable conditions to prevent abuse, to examine the employee receiving or claiming compensation, at reasonable intervals in order to ascertain what the extent and probable duration of the injuries are and whether the employee is malingering.

§ 193. Examination Must Be Reasonable—Question of Fact.

The employer must be reasonable in the time, place and number of examinations he demands and the conditions under which he demands them. If the employee refuses to submit, the employer can stop payments and apply for a determination of the question or he can let the matter remain in statu quo until the employee demands a hearing. But if it is decided that the employee's refusal was reasonable the employer must pay the back payments with interest. Whether or not a demand or refusal is reasonable is a question of fact for the board.

In *Osborne v. Vickers*, 2 Q. B. 91, 2 W. C. C. 130, *Harper's Workmen's Comp.*, § 81, the English court, construing a similar section, is quoted as follows: "Schedule 1 (4) of

the Workmen's Compensation Act confers upon the employer a right to have a workman who has given notice of an accident, examined medically, and there is a duty on the part of the workman to submit himself to examination, but the statute is silent, and the rules are partially, and I may say mainly, silent as to the time, the place and the conditions of this examination. Under those circumstances practically the common rule of law applies and imposes upon both parties the duty of acting reasonably in obeying the statute. Now it seems to me that the question whether or not one side or the other has acted reasonably in a particular case, is a question of fact in that particular case."

§ 194. "Refusal or Obstruction."

It has been held that a workman is not entitled as a matter of law to have his own doctor present. *Morgan v. Dixon*, 5 B. W. C. C. 184, L. R. A. 1916A (note) 161. And for a workman to refuse to be examined except in the office and in the presence of his legal adviser has been held "refusal" to submit. *Warby v. Plaistowe*, 4 B. W. C. C. 67, L. R. A. 1916A (note) 161. To go outside of the jurisdiction and refuse to return without payment of traveling expenses is not an "obstruction." *Baird v. Kane*, 7 Sc. Sess. Cas., 5th Series, 461, L. R. A. 1916A (note) 161. But where an injured workman goes to a far-distant country without advising his employer and without leaving his address such conduct is an "obstruction" of medical examination. *Finnie v. Duncan*, 7 Sc. Sess. Cas., 5th Series, 254, L. R. A. 1916A 161.

When an employee misunderstood the instructions of the company's doctor, and did not return for further treatment as he was told to do, and when later he lost a toe, which might or might not have been saved by the treatment, it was held that this was not such a refusal as defeated his right to compensation. *Pontiatowski v. Stickley Bros. Co.* (Mich.), 160 N. W. 569.

§ 195. What Is Unreasonable Refusal to Submit to Surgical Operation or Follow Medical Advice.

Whether or not the action of an employee in refusing to submit to a surgical operation or in failing to follow competent medical advice, is reasonable, has almost universally been held to be a question of fact, to be determined by a careful inquiry into the circumstances of each case. What would be reasonable in one man's case, might be held unreasonable in that of another. There are a large number of precedents established, and it may be said that, as a general rule, the employee's conduct is held unreasonable when his own and his employer's doctors are unanimous as to the course of treatment which he refuses to follow.

In *Walsh v. Locke, etc.* (Eng.), W. C. Ins. Rep. 98, 6 N. C. C. A. 675, a collier injured the middle finger of his right hand. An operation failed to cure the member. He refused an operation to remove the finger although the doctor advised it would restore his original capacity for work. The court said: "There is of course no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment. The law as laid down by *Warncken v. R. Moreland & Son, Ltd.*, supra, was also followed in *Marshall v. Orient Steam Navigation Co., Ltd.* (1910), 1 K. B. 79; 7 L. J. K. B. 204, 101 L. J. 584, 26 J. L. R. 70, 54 Sol. J. 64, 3 B. W. C. C. 15, where Cozens-Hardy, M. R., said: "The true test is whether the continued disability is due to the accident or to the man's unreasonableness in refusing to submit to the operation. The question of unreasonableness is one of fact or of inference from fact. There have been cases where there has been conflicting medical testimony, and in such cases

if there is evidence of the man's own doctor, who is competent to judge, that an operation would be attended with risk, then refusal to submit to the operation would not be unreasonable. . . . The question is one of fact, and on the facts as proved, it is impossible to come to any other conclusion than that the man unreasonably refused to take a step which any reasonable man would willingly submit to."

Compensation may be refused or stopped, if already allowed, if the disability is aggravated, caused or continued by an unreasonable refusal on the part of an injured person to submit to competent surgical treatment or follow medical advice. What is an "unreasonable refusal?"

Where a man's own doctor advised him to refuse to submit to an operation because an anaesthetic would be dangerous on account of his diseased condition, although the doctor for the employer stated the contrary, it was held the refusal was not unreasonable. *Tutton v. S. S. "Majestic,"* 2 B. W. C. C. 346, 6 N. C. C. A. 676 (note). The burden of proving unreasonableness rests on the employer. *Marshall v. Orient Steam Nav. Co., Ltd.,* 3 B. W. C. C. 15, 6 N. C. C. A. 677 (note).

Refusal to undergo a simple operation unattended by dangerous consequences to remove the cause of disability, contrary to advice of competent surgeons, is unreasonable conduct and bars the applicant from further compensation. *Warncken v. R. Moreland & Son, Ltd.* (1909), leading Eng. Case, 2 B. W. C. C. 350, 6 N. C. C. A. 677 (note); *Paddington Borough Council v. Stack,* 2 B. W. C. C. 402, 6 N. C. C. A. 678 (note); *Gilbert Co. v. Fairweather,* 1 B. W. C. C. 349, 6 N. C. C. A. 678 (note); *Donnelly v. Baird Co., Ltd.,* 1 B. W. C. C. 95, 6 N. C. C. A. 678 (note). Where an incapacitated workman had already undergone two operations for an injury to his hand and was advised that a third would restore his capacity to work but refused, it was held that his incapacity from that time was from his refusal and not from the injury and further compensation was disallowed. *Anderson v. Baird & Co., Ltd.,* 40 Sc. L. R. 263,

6 N. C. C. A. 678 (note). It was held otherwise where his own doctor advised that the danger was not great but the beneficial results doubtful. *Hawkes v. Richard Coles & Sons*, 3 B. W. C. C. 163, 6 N. C. C. A. 678 (note). Failure to take exercise as directed has been held to reduce compensation already paid. *Upper Forest & Worcester Steel & Tin Plate Co., Ltd., v. Gray*, 3 B. W. C. C. 424, 6 N. C. C. A. 679 (note). Also as a ground for refusing compensation. *Dowds v. John Bennie & Sons*, 40 Sc. L. R. 239, 6 N. C. C. A. 679 (note); *Ianzevski v. Central Locomotive & Car Works, Ill. Ind. Bd.*, May 1, 1914; *David v. Windsor Steam Coal Co., Ltd.*, 4 B. W. C. C. 177, 6 N. C. C. A. 679 (note).

Where a workman refused to go to a hospital, although advised by his own as well as the employer's doctor to take treatment for an infection, it was held an unreasonable refusal and he was awarded compensation for such time as would have been consumed in undergoing treatment at the hospital. *Voge v. Rauf Co., Wis. W. C. Rep.* (1914) 40, 6 N. C. C. A. 679 (note). Where a man received a deep cut on the heel of the hand and was discharged a week afterward and entered a boxing match that night contrary to the advice of his physician, as a result of which the wound was reopened, became infected and finally caused the loss of the bones of his hand and wrist, the Wisconsin Industrial Board denied compensation. *Kill v. Plankinton Packing Co., Wis. Workm. Comp. Rep.* (1914) 83, 6 N. C. C. A. 679 (note).

Where at the time of making the award it seems probable that an operation will be necessary to remove the disability, compensation may be allowed conditioned upon submission to operation at the proper time. *Gordon v. Evans*, 1 Cal. Ind. Acc. Comm. Dec. (No. 14, 1914), 12; *Haley v. Hardenberg Miss. Co.*, 1 Cal. Ind. Acc. Comm. Dec. (No. 8, 1914) 127, 6 N. C. C. A. 682 (note).

It was held in Massachusetts that an employee was bound to submit to an operation where there was no unusual risk when the result would likely be a partial if not a

complete restoration of an injured member. *Floccher v. Fidelity & Deposit Co. of Maryland*, 221 Mass. 54, 108 N. E. 1032.

Where there was little danger from an operation and the employee refused to have it performed, it was held to be erroneous for the board to award compensation during such refusal under the Michigan Act. *Kricinovich v. American Car & Foundry Co. (Mich.)*, 159 N. W. 362.

See further notes, 6 N. C. C. A. 403-405, 6 N. C. C. A. 675-684, 10 N. C. C. A. 185-201, 10 N. C. C. A. 998-1006, L. R. A. 1916A 387-389.

§ 196. When Employee's Conduct Is Reasonable.

Where there is a disagreement between the claimant's physicians and those of the employer as to the advisability or success of an operation the trend of the decisions is to hold that a refusal on the part of the employee is reasonable. *Ruabon Coal Co. v. Thomas*, 3 B. W. C. C. 32, 6 N. C. C. A. 682 (note) ; *Molamphy v. Sheridan*, W. C. & Ins. Rep. 20, 6 N. C. C. A. 682 (note) ; *Rothwell v. Davis*, 5 W. C. C. 141, 6 N. C. C. A. 683 (note) ; *Sweeney v. Pumpherston Oil Co., Ltd.*, 40 Sc. L. R. 721, 6 N. C. C. A. 683 (note). The same is true where the doctors differ in the propriety of treatment, *Moss & Co. v. Akers*, 4 B. W. C. C. 294, 6 N. C. C. A. 683 (note). Also when certainty of improvement as a result of the operation is not shown. *Mercurio v. California Transportation Co.*, 1 Cal. Ind. Acc. Comm. Dec. (No. 16, 1914) 11. Where an injured workman while delirious did things contrary to the doctor's instructions and got out of bed and subsequently died possibly from the effects of these acts, it was held that the rights of his dependents to death benefits were not thereby affected. *Broghi v. Hammond Lumber Co.*, 1 Cal. Ind. Acc. Comm. Dec. (No. 8, 1914). Where an employee, injured by a blow in the stomach, was advised by a physician, whose diagnosis was confirmed by others, that an immediate operation was necessary to save his life and that the chances of recovery

were nine out of ten in his favor, refused to submit, but consented fifteen hours later, and died after two days of pneumonia, and where there was no evidence that an earlier operation would have saved his life, his actions did not as a matter of law defeat his widow's claim for compensation. *Jendrus v. Detroit Steel Products Co., et al.*, 178 Mich. 265, 144 N. W. 563, 4 N. C. C. A. 864, L. R. A. 1916A 381, Ann. Cas. 1915D 476.

In that case the court said:

"In none of the cases cited by appellants' counsel was the operation anything more than a minor operation for a trifling injury. We think the cases clearly distinguishable from the instant case, which involved a major operation of a serious nature. None of the testimony in the case goes to the length of showing that Jendrus' life would have been saved had the operation been submitted to at 8 o'clock on the evening of February 14, which was the first time that Dr. Hutchings had reached the conclusion that an operation was necessary. Peritonitis had already set in, and the vomiting had commenced, and vomitus of a fecal nature was then being expelled. That it was the injury which caused the peritonitis is not questioned; that it was the peritonitis which caused the vomiting of fecal matter is not questioned; that it was the taking of fecal matter into the lungs which caused the pneumonia is claimed by all of the surgeons who testified. There is testimony that he might have recovered without any operation, although that result could not have been reasonably expected. Under all the circumstances of the case, including the fact that Jendrus was a foreigner, unable to speak or understand the English language, that he was suffering great pain on the evening of the 14th, that he was unacquainted with his surroundings, and that he did consent to, and did submit to, an operation within fifteen or sixteen hours after it was first found necessary, in the judgment of the surgeons, we can not hold, as matter of law, that the conduct of Jendrus was so unreasonable and persistent as to defeat the claim for

compensation by his widow. Neither can we hold that Jendrus by his conduct in the premises in causing a delay in the operation was guilty of intentional and willful misconduct. We can not say, as matter of law, that the industrial accident board erred in its conclusions of law in affirming the action of the committee on arbitration. No other questions of law are presented by the record."

Where a claimant was ordered to submit to an operation for femoral hernia, the ruling was held erroneous, on the ground that the claimant's refusal was not unreasonable where a risk of life was involved. *McNally v. Hudson & M. R. Co.*, 95 A. 122, 87 N. J. L. 455.

See further notes on this subject in 6 N. C. C. A. 675-684, 6 N. C. C. A. 403-405, 10 N. C. C. A. 185-201, 10 N. C. C. A. 998-1006, L. R. A. 1916A 387-389.

§ 197. Malpractice As Affecting Compensation.

In *Viita v. Dolan* (Minn.), 1916, 155 N. W. 1077, the court, in holding that the employer was not liable under the Minnesota Act for disability caused by malpractice, said: "It by no means follows that the one whose negligence causes the original injury is liable for the negligence of the physician employed to treat it, and it is clearly not true that the physician is not liable to the patient for such negligence. When it appears, as it clearly does here, that there is a liability on the part of the physician to the patient, it is a strain to hold that a settlement between the injured man and the wrong-doer for the injury by the accident, whether made under the compensation act or outside of it, includes the claim that the injured man has against his physician for a separate and subsequent injury."

Section 5 of the Kentucky Act specifically meets this situation, but does not affect the employee's action for malpractice against the physician. The effect of the latter part of this section is that under no conditions is the employer subject to a suit for damages merely because the

doctor or hospital, to which the employer sent the injured workman, was negligent in their treatment of him.

In *Della Rocca v. Stanley Jones & Co. (Eng.)*, 1914 W. C. & Ins. Rep. 34, 6 N. C. C. A. 624, 7 B. W. C. C. 101, the court, in denying a recovery against the employer for malpractice of the physician, said (quoting *Humber Towing Co., Ltd., v. Barclay*, 5 B. W. C. C. 142): "In this case we have been asked by Mr. Owen to say not only that the employer is liable, in the words of the act, for a personal injury by accident arising out of and in the course of the employment, but that he is an insurer of the medical man, the chemist and the nurse who attended the man, and is liable in the event of any of them being guilty of gross negligence, which gross negligence might be found as a fact to be the real cause of the disability at the time the matter came before the county judge."

In *Pawlak v. Hayes*, 162 Wis. 503, 156 N. W. 464, 11 N. C. C. A. 752, arising under the Wisconsin Act, the court said: "The compensation act requires the employer to furnish a physician and makes him liable for the value of the physician's services for not to exceed ninety days, Section 2394-9 subd. 1. This, we think, implies liability for any aggravation of the injury caused by the negligence of the physician treating the employee during such time. Whether the employer would be liable for malpractice after the expiration of ninety days is not decided. The negligent treatment here is alleged to have begun about two weeks after the accident."

In *Ross v. Erickson Const. Co.*, 89 Wash. 634, 155 Pac. 153, 11 N. C. C. A. (note) 757, the Washington court held that an injured employee had no right of action for an injury caused by malpractice of the attending physician. "Counsel reason from the wrong premise. The resultant injury or 'aggravation,' to use the words of the statute, is not an independent injury. It is proximate to the original hurt and is measured as such. Surgical treatment is an incident to every case of injury or accident and is covered

as part of the subject treated. . . . When a workman is hurt and removed to a hospital, or is put under the care of a surgeon, he is still, within every intendment of the law, in the course of his employment and a charge upon industry, and so continues as long as his disability continues. The law is grounded upon the theory of insurance against the consequence of accidents. The question is not whether an injured workman can recover against any particular person, but rather: Is his condition so directly or proximately attributable to his employment as to invoke the benevolent design of the State?"

In *Salvatore v. New England Casualty Co.*, 2 Cal. Ind. Acc. Comm. Dec. 355, 11 N. C. C. A. (note) 760, the California commission said: "An industry is liable for all legitimate consequences following an accident, among which consequences affecting the extent of disability is the possibility of an error of judgment or unskillfulness on the part of any attending physician, whether called in by the employer or the employee. While the employer, to avoid the increase of disability by unskillful treatment by other physicians, may offer his own physician, the only penalty provided for refusal of an employee to accept such treatment is the fact that the employee thereby forfeits the right to have his medical bills paid by the employer. No other loss of benefits is provided to reinforce this provision, unless the physician be not licensed to practice or be guilty of such gross ignorance or carelessness that the injured employee can be said to be guilty of unreasonable refusal to submit to medical treatment in engaging him in preference to other treatment offered."

It has been held in California in the case of *Stockwell v. Waymire*, 1 Cal. Ind. Acc. Comm. Dec. 2, 6 N. C. C. A. (note) 624, that "If the treatment was unfortunate and the selection of a physician not wisely made, the fault is properly chargeable to the employer, who was present at the time of the accident, who had opportunity to designate what physician the injured employee should go to to be attended

to, who contented himself by merely saying that the injured employee ought to go and see a doctor."

For further consideration of these questions, see 6 N. C. C. A. (note) 624-629, 11 N. C. C. A. 752-762.

CHAPTER VIII

NOTICES OF AND CLAIMS FOR INJURIES

Section.

- 198. Employee, or some one for him, must give notice of accident.
- 199. Form of notice or claim.
- 200. Who may make claim.
- 201. When the manner of giving notice is sufficient.
- 202. When the employer has "knowledge of the injury."
- 203. Meaning of "mistake or other reasonable cause."
- 204. When an employer is "mislead to his injury."
- 205. When the employer is not prejudiced.
- 206. Limitation of proceedings for compensation.

§ 198. Employee, or Some One for Him, Must Give Notice of Accident.

The acts are quite uniform on the question of what notice of injury and claim is to be given by the employee. Generally, it may be said that the employee or some one for him must give notice to the employer as soon as practicable after the happening of the accident. The employee has a reasonable time to give this notice under all the facts and circumstances of his particular case, but must do so within the time limit provided by the act, after which claims for compensation are barred. The decisions on the meaning of the phraseology, which is most commonly used, in the provisions of the acts on this subject, are treated in the following sections. The purpose of requiring notice is to give the employer the opportunity for investigation of the facts of the accident to learn whether or not it is covered by the act and to provide the necessary medical or surgical attention so as to reduce the disability.

§ 199. Form of Notice or Claim.

Most of the acts set out specifically what must be stated in a notice of accident or injury. It is usually provided that the notice shall contain the name and address of the employee and shall state in ordinary language the time, place of occurrence, nature and cause of the accident. The nature and extent of the injury must be set out, giving as definite information as the circumstances permit. The nature of the work in which the injured employee was engaged at the time of the accident must also be stated and the names of witnesses to the accident must be given.

The acts also usually provide how claim for compensation shall be made. But, unless the act says that claims cannot be made except in the manner provided by them, any form of claim which is in writing and signed by the claimant and presents a reasonably intelligible demand for compensation under the terms of the act would protect the rights of the claimant. In order to fully protect the claimant notice should be given in each case as provided by the act.

§ 200. Who May Make Claim.

Section 33 of the Kentucky Act provides that "such notice and such claim may be given or made by any person claiming to be entitled to compensation or by some one in his behalf." A provision similar to this is found in many of the acts of other States. Any person who is entitled to receive compensation may generally either give notice or make claim, such as the injured man, his dependents, personal representative, administrator, guardian, next friend, committee or trustee. "Some person in his behalf" probably means a person who gives notice or makes claim at the specific request of and in behalf of some person claiming to be entitled to compensation and who for some sufficient reason is unable to make claim or give notice directly. While the words used in compensation acts are generally liberally construed, it was probably not intended to allow

any person to make claim or give notice unless they either had a direct legal connection with a beneficiary or were possible beneficiaries of the act themselves.

In *McFarland v. Central R. R. Co. of N. J.*, 84 N. J. L. 435, 87 Atl. 144, 4 N. C. C. A. 592, the court said: "By whatever name the proceeding may be called it may properly be set on foot by any person to whom, under the nineteenth section of the act, payment is to be made, i. e., payment for the purposes of distribution."

It has been held that a father may institute proceedings where an unmarried son has been killed. *Reimers v. Proctor Pub. Co.*, 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738, L. R. A. 1916A (note) 271, and also that the claim need not be made for a definite sum; *Thompson v. Goold*, 3 B. W. C. C. 392, L. R. A. 1916A (note) 85.

In *Matwiczuk v. American Car & Foundry Co.*, 155 N. W. 412 (Mich.), the court said:

"What was done gave the employer every opportunity to investigate the accident, and knowledge of all material things relating thereto, as fully as though an application had been made in a formal way by the widow upon the day when the letter was written. The next day after the injury the employer was notified of it, the result of it, the time and place and cause of its happening, and of the persons who were dependent. This notice was given, not by an outsider, but through the agency of the brother-in-law of the deceased, the brother of the widow. What was done was notice of a claim by the deceased's dependents, made by a person in their behalf. We think it too technical to say that a notice and claim, made within twenty-four hours after the accident, caused to be given, as in this case, in behalf of the widow, who could not make the claim herself because of the distance from where she lived, which action was ratified by her on being advised of the situation, must fail because the ratification did not reach this country within six months from the time of the accident. To so hold would not be according to the letter or the spirit of

the Employers' Liability Act. It is clear that what was done gave the employer notice of the injury, thus affording an opportunity for a full investigation. It also gave notice of who were dependents. We think it is also clear that the company was informed that the brother-in-law, by employing the attorney who wrote the letter giving this information, was seeking to protect the interests of the widow and minor children, who were in Poland, and the inference follows almost as of course that a claim was urged in their behalf, growing out of the death of the husband and father. The language of the statute indicates that the notice and claim might be in ordinary language, and might be signed by dependents 'or by a person in their behalf,' and what would be more natural than to assume that a brother of the widow in her absence would act for her?"

§ 201. When the Manner of Giving Notice Is Sufficient.

Generally, if the employer is a partnership, service on one of the partners is sufficient; if a corporation, on any agent upon whom process may be served or upon any officer or agent in charge at the place where the accident occurred.

In England it was held that notice given to an inspector and timekeeper was not sufficient, *Jackson v. Vickers*, 5 B. W. C. C. 432, L. R. A. 1916A (note) 85. Nor was it sufficient to give the notice to the foreman of a department of a large factory. *Pimm v. Clement Talbot*, 7 B. W. C. C. 565, *Plumley v. Ewart & Son*, 8 B. W. C. C. 464, L. R. A. 1916A (note) 85.

The following notices to agents or officers of employers have been held sufficient by courts and industrial boards, although not given in the formal manner provided by the act: A conversation concerning the injury with one of the officers of the employer, *Kelly v. Consumers Co.*, Ill. Ind. Bd. Dec., July 30, 1914; where the secretary saw the injured man once a week for a month following the accident, *Stinton v. Brandon Gas Co., Ltd.*, W. C. Rep. 132 (Eng.); where a mine official entered the particulars of an accident

the first of these was the fact that the United States had a large population of free negroes, who were not only free but also possessed of property. This was a situation which was not only new to the world but also to the United States. The second of these was the fact that the United States had a large population of free negroes, who were not only free but also possessed of property. This was a situation which was not only new to the world but also to the United States.

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The ninth of these was the fact that the United States had a large population of free negroes, who were not only free but also possessed of property. This was a situation which was not only new to the world but also to the United States. The tenth of these was the fact that the United States had a large population of free negroes, who were not only free but also possessed of property. This was a situation which was not only new to the world but also to the United States.



in a book in the presence of the injured man, *Stevens v. Insoles, Ltd.*, W. C. Rep. 111 (Eng.); notice to a manager a half hour after the accident, *Ralph v. Mitchell*, W. C. & Ins. Rep. 501 (Eng.); telephone message by a guardian to a cashier, *Striegel v. Am. Radiator Co.*, Ill. Ind. Bd. Dec. May 6, 1915; a verbal notice to a foreman which would have been good if reduced to writing, *Hewitt v. Stanley Bros., Ltd.*, W. C. & Ins. Rep. 495 (Eng.).

The following notices have been held insufficient: A notice given by the employee's mother to the employer's bookkeeper, *Coltman v. Morrison & Mason, Ltd.*, W. C. & Ins. Rep. 43; a conversation of the employee's wife with the employer's bookkeeper, *Eydman v. Premier Accum. Co., Ltd.*, W. C. Ins. Rep. 82; notice to one who was a kind of foreman, *Jackson v. Vickers, Ltd.*, W. C. Rep. 274; to the foreman when the manager was on the floor below, *Plumley v. Ewart & Son, Ltd.*, W. C. & Ins. Rep. 317; notice to the ambulance man of the employer, *Coltman v. Morrison & Mason, Ltd.*, W. C. & Ins. Rep. 43. See further note in 9 N. C. C. A. 749-753, where most of the above cases were discussed.

The notice of injury and claim for damages made within twenty-four hours of the injury through an attorney employed by the brother-in-law of the deceased for the dependent family when ratified within six months by mailing the ratification, held to be a sufficient compliance with the Michigan Act with regard to notice. *Matwiczuk v. American Car & Foundry Co.*, 155 N. W. 412 (Mich.)

The Massachusetts Workmen's Compensation Act does not require an injured employee to state in his claim for loss the nature of the compensation demanded. *Lemieux v. Cont. Mutual Liability Ins. Co.*, 222 Mass. 346, 111 N. E. 782.

§ 202. When the Employer Has "Knowledge of the Injury."

Some of the acts provide that "want of notice or delay in giving notice shall not be a bar to proceedings

under this act if it be shown that the employer, his agent or representative had knowledge of the injury." The acts usually call for written and signed notice from the employee to the employer of each accident for which the employee desires to claim compensation, but they generally provide, and this is also the general rule, that a claim for compensation will not be allowed to fail merely because the employee failed to give or delayed in giving written notice, provided only that the employer or his agent or representative had actual knowledge of the injury. The actual knowledge must be had either by the employer himself or by some proper agent or representative of the employer. In *re McLean*, 223 Mass. 342, 111 N. E. 783; *State v. Dist. Ct. (Minn.)*, 156 N. W. 278.

Under such a provision in Minnesota it was held that when the employer admitted having full knowledge of the injury formal notice thereof was unnecessary. *State Ex rel Duluth Diamond Drilling Co. v. Dist. Ct.*, 129 Minn. 423, 152 N. W. 838, 9 N. C. C. A. 1119. It has also been held that the employer may by his conduct waive the failure of the plaintiff to make a claim within the time specified in the statute or at any time prior to the time when the notice was given. *Roberts v. Charles Wolff Packing Co.*, 95 Kan. 723, 149 Pac. 413, L. R. A. 1916A (note) 245.

In *Allen v. City of Millville*, 87 N. J. L. 356, 95 Atl. 130, 9 N. C. C. A. 749, the New Jersey court said: "A private or a municipal corporation, as a legal entity, can not of itself have knowledge. If it can be said to have knowledge at all, that must be the imputed knowledge of some corporate agent. The act would fail of its purpose unless it were applicable to corporate, as well as to individual, employers. We think, therefore, that the knowledge of the proper corporate agent must be regarded as, in legal effect, the knowledge of the corporation. If we are right in this construction of the statute, there can be no doubt that the knowledge of Mr. Kates was the knowledge of the city, since he was the

commissioner actually in charge of the work on which Allen was employed."

It has also been held that the knowledge of the Mayor of a city concerning an injury was the knowledge of the city. *State Ex rel Northfield v. Dist. Ct.*, 131 Minn. 352, 155 N. W. 103.

As to notice over the telephone the Illinois Industrial Board, in *Cutoria v. Swieberg*, 9 N. C. C. A. 1125, said: "The contention that the conversation over the telephone is not admissible for the purpose of proving notice, is not tenable. Instances may arise where a conversation over a telephone would not be admissible, but that is not this case. It is not the conversation, or the substance, that is sought to be introduced. It is the mere fact of notice over the telephone, and there can be no question about its competency."

Under the Massachusetts Act, which provides that want of notice shall not be a bar if the employer had knowledge of the injury, an injured employee gave notice to his foreman and the employer filed a report of the injury. It was held that the proceedings of the employee were not barred because of his failure to notify the employer. *In re McClain*, 111 N. E. 783, 223 Mass. 342.

Under the Massachusetts Act a foreman who knew of an accident was held to be the agent of the employer, so that the employer had constructive knowledge of the accident. *In re Bloom*, 111 N. E. 45, 222 Mass. 434.

See further note, 9 N. C. C. A. 1119-1126 and 9 N. C. C. A. 749-753.

§ 203. Meaning of "Mistake or Other Reasonable Cause."

Some of the acts provide that want of notice or delay in giving it shall not be a bar to proceedings if it be shown "that such delay or failure to give notice was occasioned by mistake or other reasonable cause." The meaning of these words is a question of law, but whether or not there was a mistake or reasonable cause is a question of fact

which is not reviewable except on the ground that the conclusion reached was against the weight of the evidence. These same words are used in the English Act.

In the case of *Flood v. Smith & Leishman*, 1 Scot. L. T. 340, 9 N. C. C. A. 1027, Flood received a slight abrasion on one of his fingers on December 2, 1913. He gave verbal notice to his foreman two days later and the foreman failed to report the fact. Formal notice was not given until April 22, 1914. It was found by the arbitrator that notice was not given "as soon as practicable" and that the employer was prejudiced by the failure to give it, but it was held that this want of notice was caused by "mistake or other reasonable cause." This finding was based on the fact that the employee was illiterate, not being able to read or write, and that neither at the time of the accident nor for a considerable time thereafter did he regard the injury as serious. It was only when he was sent to an infirmary on his doctor's advice that he considered the injury serious enough to claim compensation. The fact that he had told the foreman and worked with his finger bandaged was found sufficient to cause him to believe that the employer knew of his injury. The court said: "The finding that the man had good excuse, or labored under a mistake, in failing to give notice because he did not know how serious his injuries were, was challenged by the counsel for the appellants in law, and it was argued that this was not sufficient to entitle the arbitrator to come to the conclusion that there was a mistake, or that there was a reasonable cause for failure to give notice. I am of opinion that it was sufficient, and I do not well see how the arbitrator could have come to any other conclusion, facing him the cases of *Rankine v. Alloa Coal Co., Ltd.*, (6 Fraser 375, 41 S. L. R. 306, 11 S. L. T. 670), and of *Brown v. Lochgelly Iron & Coal Co., Ltd.* ([1907], S. C. 198, 44 S. L. R. 180, 14 S. L. T. 545). The former of these cases seems to me to have decided this very question. Lord Adam puts it in a sentence thus: 'He thought his injury was not as serious as it was and I think that was

a reasonable cause for not giving notice.' And although, no doubt, Lord Adam himself and the other two judges who agreed with him put the excuse upon the ground of mistake, it is by no means unreasonable to hold that it might not only be a mistake, but might be a reasonable cause for failure to give notice, that the man did not realize the seriousness of his injuries at the time, and did not for some considerable time subsequent to the date of the accident realize how serious his injuries were. . . . And for my part, whilst I do not differ from the view that it may be regarded as a mistake, I prefer to base my judgment upon the ground that it was a reasonable cause. . . . That a man who is laboring under an error as to the seriousness of the injury which he has suffered has reasonable cause for not giving the notice enjoined by the statute is a proposition I am prepared to affirm. Whether he is under such an error or not is, of course, a question exclusively for the arbitrator to determine." Lord Johnston, while concurring with the court in the conclusion reached, said: "I think that the words in question are not to be read loosely, as they seem to me to have been read by the court in *Rankine v. Alloa Coal Co., Ltd.* (6 Fraser 375, 41 S. L. R. 306, 11 S. L. T. 670), but to be read somewhat strictly, inasmuch as they introduce an exemption from a penalty, presumably properly imposed, upon the workman for not giving his notice in good time. I think that it is a question whether the terms 'mistake' and 'other reasonable cause' are to be run into one another and treated as if it did not matter which, and as if it did not matter whether you can put your finger upon a real mistake or a real and intelligible other cause of a reasonable nature I question whether they do not require, particularly when read along with 'absence from the United Kingdom,' to be more strictly applied than they have been in the two Scottish cases."

In *Lynch v. Marquis of Lansdowne*, 48 Ir. L. T. 89, 9 N. C. C. A. 903, it was said: "Mere payment of wages or part wages, by an employer to an injured workman after

the latter has been injured is, by itself, a neutral fact, and is not sufficient to enable the court to draw the inference that the workman had 'reasonable cause' within the meaning of the statute for not making claim within six months of the date of the accident."

In *Luckie v. Merry*, 2 K. B. 83, 9 N. C. C. A. 895, Lord Cozens-Hardy, M. R., said: "This raises an important point; it is this: An old servant meets with an accident in the course of his employment to the knowledge of his master, who treats him well and tells him 'notwithstanding you are not able to do your ordinary work, go and potter about in the works.' He remains there, and, after a time, he does his own work again fully, except there is some portion of the grooming which he is not able to manage, but, speaking substantially, during more than six months he remains in the employment of his master receiving his old wages, and for part of the time doing his old work. Is that a reasonable cause for not making claim which need not be a written claim? 'Reasonable cause' of course must have reference to the workman himself. . . . I should say without hesitation, looking, as I am entitled to do, to the facts that this was an old servant, and his master when the accident was explained to him gave him the direction above quoted, that there was reasonable cause from the man's point of view for not giving a notice such as this: 'I have no claim now because you are paying me my full wages, but, mind you, there may be in the future a contingent claim which I shall have against you for compensation.' That would be a sufficient notice. It would be narrowing the construction of the words 'reasonable cause' if we were to say in this case, having regard to all the circumstances, that there was not a reasonable cause."

The Massachusetts Act provides that failure to make a claim shall not bar proceedings if occasioned by mistake or ignorance by the employee of the act's requirements. The evidence was held insufficient to sustain the finding that the employee failed to file a claim for compensation with

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the board because of a mistake. In *re McClain*, 111 N. E. 783, 223 Mass. 342.

For exhaustive annotations upon this point, see L. R. A. 1916A, 89-93, 9 N. C. C. A. (note) 1027-1045, 9 N. C. C. A. (note) 895-916. See also *Eke v. Hartdyke*, 3 N. C. C. A. 230.

§ 204. When An Employer Is "Mislead to His Injury."

Usually if a notice is not given by the employee "as soon as practicable" after an accident and the employer is prejudiced by the delay or "mislead to his injury," compensation will not be allowed. Provisions very similar to those now being discussed are found in many American acts and in the English Act, where it is said, "As soon as practicable" is a question of fact, and it has been held in the Court of Appeals that if an injury is apparently trifling, notice need not be given till it turns out to be serious. See *Snelling v. Norton Hill Colliery Co.* ([1913] W. C. & Ins. Rep. 497), 9 N. C. C. A. 974.

In *Hayward v. West Leigh Colliery, Ltd.* [1915], A. C. 540; W. C. & Ins. Rep. 233, 9 N. C. C. A. 966, Hayward suffered a slight bruise and abrasion of the skin by striking his knee while at work on April 1, 1913. He worked the next day, was off a day and worked the two days following, his knee paining him and becoming more swollen all the time. On April 5 he called a doctor. On April 8 a fellow employee told a fireman who worked at the mine that Hayward was laying off on account of an injury to his knee received at the mine. On April 9 he was taken to an infirmary and died the following day of blood poisoning. Notice in writing was given to the employers by the wife on April 24, 1913, and this was the first actual notice they had received. The question of whether the notice to the fireman constituted actual knowledge of the injury was not raised. The case was appealed to the House of Lords and the finding of the arbitrator that under these facts, the employer was not prejudiced was upheld. It was

admitted that the provisions of the act as to notice were not complied with. It was argued that by failure to give notice the employer was prevented from giving the man the best medical attention immediately and that this might have avoided the result. Lord Sumner said: "Now the finding which is to be arrived at is, of course, a finding upon all of the facts which are proved, and I do not think that those facts include the mere circumstance that the defendant does not give further evidence, or call certain witnesses whose absence is not accounted for. The arbitrator has to take the facts as they have been proved before him, and, if it be a case in which facts are proved on both sides, he has to take the totality of the facts as he finds them and then come to his conclusion. The question for the court of appeal upon that is whether the totality of such facts contains evidence upon which he could, without error in law, come to a finding of fact, such as he arrived at, at all." Lord Parmoor said, speaking of the wording of the act: "In my opinion it is very necessary to regard the words themselves, and the words are these: 'The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defense by the want, defect or inaccuracy.' Now it has been found in this case in the proceedings for settling the claim that the employer has not been prejudiced in his defense by want or defect or in accuracy. Therefore, I apprehend the only question to be whether in coming to that conclusion, there is any error in law on which the county court judge can be put right in the court of appeal or in this house. In my opinion there is no error in law of that kind."

In *Ford v. Gaiety Theater, Ltd.*, 7 B. W. C. C. 197, 9 N. C. C. A. 967, a stage hand got a splinter in his hand on February 21 or 24, which he picked out with a knife. He died of blood poisoning on March 5, but no notice was given

until March 19. A fellow employee could not recall on which arm the injury was sustained, and it was too late to discover this fact, which was important because there was a question whether the poisoning was due to the splinter or another source. It was held that the employer was prejudiced by the delay.

It was likewise held where, after an injury to the eye on June 26, 1914, which was so serious as to impair the sight, no notice was given until August 5, 1914. *Miller v. Richardson*, W. C. and Ins. Rep. 381, 9 N. C. C. A. 969.

In *Snelling v. Norton Hill Coal Co.*, W. C. and Ins. Rep. 497, 9 N. C. C. A. 970, an employee received an abrasion of the skin on November 7, 1912, while loading coal on a wagon. No one saw the accident and no formal notice was given until November 21, 1912, when he claimed disability from blood poisoning. The judge said: "Notice of the accident must be given at the earliest time practicable. To my mind, it certainly was practicable for him to have given notice when he felt the pain and noticed the swelling on the Saturday or Sunday (following the accident). The notice was not given until November 21, and it therefore does not come within the meaning of the term 'as soon as practicable.'"

Under somewhat similar facts the same was held in *Plumley v. Ewart & Son, Ltd.*, W. C. & Ins. Rep., 317, 9 N. C. C. A. 971, and in *Unger v. Howell*, W. C. & Ins. Rep. 58, 7 B. W. C. C. 36, 9 N. C. C. A. 972, and in *Ing v. Higgs*, 7 B. W. C. C. 65, 9 N. C. C. A. 973.

The Massachusetts Act provides that "notice must be given as soon as practicable after the happening thereof" A claim for compensation filed four months after an accident was too late to constitute written notice of the injury, within the meaning of the Massachusetts Act. *In re Bloom*, 222 Mass. 434, 111 N. E. 45.

In all of the above cases it was held that the burden was on the employee to show that the employer was not prejudiced. In *Nichols v. Britton Ferry Urban Dis. Council*

(1915), W. C. & Ins. Rep., 14, 9 N. C. C. A. 974, the court said: "The onus is on the applicant to show that the respondent was not prejudiced." See also L. R. A. 1916A 88, note.

For note discussing the above cases and others in point, see 9 N. C. C. A. 966-990, and L. R. A. 1916A 86-93.

§ 205. When the Employer Is Not Prejudiced.

It has been held that the employer is not prejudiced where there is no evidence that if the notice were given immediately after the accident, they would have been in any better position than they actually were at the time when notice was given. *Howard v. Rowsell*, 7 B. W. C. C. 552, L. R. A. 1916A (note) 87. Likewise, where the workman consulted the employer's doctor two or three days after the accident. *Bruno v. International Coal & Coke Co. (Alberta)*, 7 B. W. C. C. 1033, L. R. A. 1916A (note) 87.

It was held that the fact that the employee did not give notice to his employer, and therefore the employer could not give due notice to his insurance company, and thereby lost his right of indemnity, was not relevant upon the question of prejudice, because failure to give notice to an insurance company does not prejudice the employer in the defense of a claim by the employee. *Butt v. Gellyceidrim Colliery Co.*, 3 B. W. C. C. 44, L. R. A. 1916A (note) 88.

Where there was a failure to give the notice of accident as required by the State of Wisconsin, where there was no intent to mislead, and where the employer was, in fact, not mislead, compensation was held to be properly awarded to the widow. *City of Milwaukee v. Industrial Comm.*, 160 Wis. 238, 151 N. W. 247.

An employee failed to give formal notice of an injury within ten days after its occurrence, but the employer's foreman knew of the accident and had sent him to their physician. It was held that the failure to give notice was not prejudicial, and therefore not a bar to recovery. *Ackerson v. National Zinc Co.* 96 Kan. 781, 153 Pac. 530.



§ 206. Limitation of Proceedings for Compensation.

A limitation, varying from six months to two years in the various acts, is usually placed upon the right to make claim for compensation. This limitation begins to run with the accident or injury. But it is held in California that it may be extended by payment of wages or compensation after the injury. Limitations in such a case begin to run from the last payment. *Turner v. City of Santa Cruz*, 2 Cal. Ind. Acc. Comm. Dec. 991. But the contrary was held where medical expenses only were paid. *Johnson v. Engstrum Co.*, 2 Cal. Ind. Acc. Comm. Dec. 788. Mere ignorance that the statute provides for a limitation on claims is not an excusable mistake. *In re Fierro* 223 Mass. 378, 111 N. E. 957.

Construing the one year statute of limitations, Ky. Stat., § 2516, the court in the case of *Geneva Cooperage Co. et al. v. Brown*, 30 Ky. L. R. 272, 98 S. W. 279, held that in computing the time within which the action must be commenced, the day of the injury must be included and if the expiration of the year falls on Sunday, that fact does not authorize the bringing of an action on the following day.

In *Stoll v. Ocean Shore R. Co.*, 2 Cal. Ind. Acc. Comm. Dec., 81 (1915), 9 N. C. C. A. 908, under a six months limitation, an employee received an injury to the eye for which compensation had been paid for several weeks and had been terminated, the disability having been thought to be ended by both parties; but, when six months after the last payment was made, a cataract had developed and a claim was made, the California Ind. Acc. Comm. held that since six months had elapsed after payment of compensation had ceased without renewal of the claim, the claim was barred by limitation.

Under the New Jersey act a petition must be actually filed with the clerk of the Court within one year after the accident. It is not sufficient to present it to the Judge. *Hendrickson v. Public Service Railway Co.*, 94 Atl. 402, 87 N. J. L. 366.

Where an employee brought an action at law for an injury within three months after the accident, and later by an amended petition asked for compensation, it was held that the action at law, though irregular, met the statutory requirement that a claim for compensation be made within three months. *Ackerson v. Nat'l Zinc Co.*, 153 Pac. 530, 96 Kan. 781.

An employee elected to prosecute a claim before the State Board. It was held that failure to push this claim was not a bar to an award by the Board. *Bomgardner v. Zilch*, 3 Ohio App. 181, 35 Ohio Cir. Ct. R. 292.

CHAPTER IX

DEFINITION OF THE FUNDAMENTAL

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CHAPTER IX

DEFENSES TO COMPENSATION

Section.

- 207. Defenses of non-electing employer.
- 208. Defenses of electing employer against non-electing employee.
- 209. Defenses of electing employer against electing employee.
- 210. Relation of employer and employee must exist.
- 211. There must be an accident or injury.
- 212. Must arise out of and in the course of employment.
- 213. Refusal to accept employment as defense.
- 214. Refusal to allow physical examination.
- 215. Refusal to submit to surgical operation or follow medical advice.
- 216. Failure to give notice of injury.
- 217. Limitations.
- 218. Willful self-inflicted injury as a defense.
- 219. Willful misconduct as a defense.
- 220. A reduction, or forfeiture of compensation for disobedience of rules.
- 221. Willful negligence of employee.
- 222. Intoxication as a defense.
- 223. Malingering as a defense.
- 224. Malingering or hysteria.
- 225. Burden of proof.

§ 207. Defenses of Non-electing Employer.

The employer who is within the scope of a workmen's compensation act but does not elect to operate under it can not set up the common law defenses, of contributory negligence, assumed risk or fellow servant, in defense of an action at law. See § 62. But the employer still has the defense that he was not guilty of any negligence in producing the injury. *Hunter v. Colfax Consol. Coal Co.*, 154 N. W. 1037—amended 157 N. W. 145. (Iowa) 11 N. C. C. A. 886. Where the employer is not covered by the act his defenses are the same as they were before its passage.

§ 208. Defenses of Electing Employer Against Non-electing Employee.

Where the employer who is within the scope of the act elects to operate under it but the employee rejects the act, the employer has all the defenses to an action at law which were allowed him before the act was passed.

In *Greene v. Caldwell et al.*, 170 Ky. 571, 186 S. W. 648, 12 N. C. C. A. 520, the court in holding the Kentucky act of 1916 to be constitutional said:

"It is true that under section 76b the employee who does not elect to accept the act and who brings an action to recover damages for personal injuries sustained by the alleged negligence of the employer who has accepted its provisions, may be met with the defenses that he was guilty of contributory negligence, or that the injuries complained of were caused by the negligence of a fellow servant, or that he assumed the risk of the accident that resulted in his injury. But, clearly, the fact that the employer may rely on these defenses is far from denying to the employee the right to recover for injuries caused by the negligence of the employer. He still has his cause of action as he has always had, and the employer has only the right to rely on defenses that he always had the right to rely on, although it should be said that the common law definition of these defenses has been greatly modified by court opinions and that they do not now excuse the employer to the full extent they formerly did.

To what extent these defenses may be relied on by the accepting employer to defeat recovery by a non-electing employee, it would be obviously improper in this opinion to undertake to say."

§ 209. Defenses of Electing Employer Against Electing Employee.

Where both employer and employee are under the act, the defenses to liability for compensation are only those which are granted by the terms of the act. Some of the

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When a patient is in a state of unconsciousness, it is not possible to determine the exact time of death. The only way to determine the time of death is by the use of a clock.

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defenses which may be set up to defeat the payment of compensation are set forth in the following sections.

§ 210. Relation of Employer and Employee Must Exist.

An employer can defend a claim for compensation on the ground that the relation of employer and employee does not exist within the meaning of the act. See Chapter I in general. For instance it could be proved that the employee came within the exempted employments. Domestic §48, Agricultural §49, Casual Employment §§37-47; or Interstate Commerce §§50-54; or was an independent contractor, §§28-35.

§ 211. There Must Be an Accident or Injury.

An employer can defend a compensation claim on the ground that the disability complained of was not due to an "accident" or "injury," as the case may be, although all the other conditions, necessary to bring the parties within the act existed. See Chapter II. generally and §§74-79 in particular.

§ 212. Must Arise Out of and in the Course of Employment.

The employer can defend on the ground that the accident or injury did not arise out of as well as in the course of the employment. This is a defense very frequently interposed. Consult Chapter III for a full discussion of this question.

§ 213. Refusal to Accept Employment As Defense.

The Kentucky and Indiana acts have provisions to the effect that if an injured employee to whom the employer is paying compensation, or who is demanding it from the employer, refuses to accept employment offered him which was reasonably suited to his capacity for work and his physical condition, he forfeits compensation during such time unless the board should hold that his refusal was justifiable. Whether or not the refusal was justifiable would probably be determined by the same line of reasoning as in the case of refusal to submit to an operation or

follow medical advice. If there was no medical evidence that the employment offered would be unsuitable, or if the weight of impartial medical opinion was to the effect that the employment offered was suitable, a refusal to accept it would probably be held unjustifiable.

For note discussing the English cases on this subject, see 10 N. C. C. A. 1081-1095.

§ 214. Refusal to Allow Physical Examination.

Where an employer has been paying compensation or where the injured man is claiming compensation but refuses to submit to a medical examination to determine the nature and extent of the injuries or disability, such refusal is usually a defense to the payment of compensation. See §§ 192-194.

§ 215. Refusal to Submit to Surgical Operation or Follow Medical Advice.

When the employee disobeys the instructions or fails to follow the advice or treatment prescribed by the physician and thereby aggravates his injury or increases his disability, such conduct is often a defense to the payment of compensation and is sometimes termed willful misconduct. The refusal to submit to reasonable treatment or to a surgical operation which will relieve disability without great danger to the life of the injured man, is generally a defense to the payment of compensation during such refusal. See §§ 195-196.

§ 216. Failure to Give Notice of Injury.

Where the employee has failed to give the notice of injury, in the manner and within the time provided by the act, and when the employer has no knowledge of the injury and there is no reasonable excuse for the failure of the employee to give such notice, the lack of notice is usually a defense to a claim for compensation. See §§ 198-205.

§ 217. Limitations.

The acts usually provide a limitation period within which claim for compensation must be made. Failure to

make claim within such period in the manner provided by the act is a defense to compensation. See § 206.

§ 218. Willful Self-inflicted Injury As a Defense.

No cases in courts of last resort have been found dealing with this state of affairs. The meaning of the act having such a provision, however, is very plain. No employee is entitled to compensation if he deliberately and willfully inflicts injury upon himself or intentionally puts himself in a position to be injured in order to collect compensation. It is not likely that this situation will arise often because there is no compensation for the waiting period (see § 127), and the benefits provided would be unlikely to tempt a workman to maim himself. If this defense is set up by an employer, the burden is on him to prove that the injury was both willful and self-inflicted. Acts which at common law would amount to gross negligence on the part of the employee do not imply "purposely self-inflicted" injury under the Ohio act. *Stopyra v. U. S. Coal Co.*, Vol. 1 No. 7, Bul. Ohio, Indus. Com., p. 92.

§ 219. Willful Misconduct as a Defense.

While the term "willful misconduct" includes what was before known as "contributory negligence," the terms are by no means synonymous. *Reeks v. Kynoch, Ltd.*, 3 B. W. C. C. 14, 2 N. C. C. A. (note) 860. In *re Burns* (Mass.) 105 N. E. 601, 5 N. C. C. A. 635, the court said: "Serious and willful misconduct is much more than mere negligence or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences."

Where the negligence of the employee consists of merely thoughtless or careless action on his part, it is not willful misconduct. So in the case of an employee who was injured loading automobiles on a car and who crossed through the standing train without looking to see whether

it was ready to start, the Michigan court said: "While it is quite clear that the claimant's injury was brought about by his own gross negligence, we are of the opinion that it can not be said as a matter of law, that he was guilty of such intentional and willful misconduct as would defeat his recovery. *Gignac v. Studebaker Corp.* 186 Mich. 576, 152 N. W. 1037, L. R. A. 1916A (note) 243.

In the case of *Great Western Power Co v. Pillsbury (Cal.)* 149 Pac. 45, 9 N. C. C. A. 466, L. R. A. 1916A (note) 244, where a lineman, working about live wires, was furnished with rubber gloves and instructed to use them but was injured because of his failure to do so, the court said: "It can not be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct, and that where the workman deliberately violates the rule with knowledge of its existence, and of the dangers accompanying its violation, he is guilty of willful misconduct."

In *re Nickerson*, 218 Mass. 158, 105 N. E. 604, 5 N. C. C. A. 645, an employee had been engaged to do some whitewashing. He was told not to work around the machinery or shafting until the noon hour when it was stopped. He started to work there shortly before it was time for the machinery to stop and was injured. The court said: "Here the Industrial Accident Board has found, in accordance with the report of the arbitration committee, that this was not 'serious and willful misconduct'; that 'the shafting and machinery were about to stop at any moment, in the mind of the employee, when he could continue to work with safety. His decision to do some whitewashing during this very brief interval seems more like a sudden thought than a willful act. It seems that it should be fairly regarded as a minor transgression, at most, from his standpoint, and not as 'serious and willful misconduct.' . . . The fact that the injury was occasioned by the employee's disobedience to an order is not decisive against him. To have that effect the disobedience must have been willful, or as was said

by Lord Lareburn, in *Johnson v. Marshall, Sons & Co., Ltd.*, App. Cases 409, 411, 'deliberate, not merely a thoughtless act on the spur of the moment.' "

In *Rideout Co. v. Pillsbury et al.* — Cal. —, 159 Pac. 435, a deckhand who helped to unload a barge at the end of a trip was last seen leaning against a post near the barge's edge apparently asleep. The owners claimed a well established rule requiring deckhands to remain inside during trips. It was not shown that anyone instructed the deceased in regard to this rule although the foreman had instructed others. It was also shown that the men had been playing cards on the deck during this trip and that the foreman had joined in. It was held that this testimony was not sufficient to establish a specific rule. As to the conduct of the decedent the court said. "While his conduct was not careful and was not characterized by such caution as would be entirely commendable in one afloat upon such a craft, we can not say that it amounted to willful misconduct."

In *Brooklyn Mining Co. et al. v. Industrial Acc. Comm.* — Cal. —, 159 Pac. 162, it was held not to be willful misconduct for a miner on a hot day to rest in the shade of an ore bin after coming out of the shaft. It was customary for the miners to do this. The bin collapsed while he was resting near it and killed him.

It was held to be willful misconduct in California for an employee to drive an automobile at a speed prohibited by the Motor Vehicle Act. *Fidelity & Deposit Co. of Maryland v. Industrial Acc. Comm.* 171 Cal. 728, 154 Pac. 834.

A night watchman and the deputy sheriff shot at each other, each believing that the other was an escaping robber. The defense of serious and willful misconduct was interposed. The Court held that this defense could not be relied upon under these circumstances, but compensation was denied for another reason. In *re Harbroe* 222 Mass. 139, 111 N. E. 709.

The question whether or not an employee was guilty of willful misconduct was held to be a jurisdictional question,

and therefore subject to review by the Supreme Court, under the California Act. *Fidelity & Deposit Co. of Maryland v. Industrial Acc. Comm.* 171 Cal. 728, 154 Pac. 834.

Notes dealing with the question of willful misconduct can be found in L. R. A. 1916A 243-244 (American cases) 75-79. English cases); 2 N. C. C. A. 860-884; 4 N. C. C. A. 881-889; 8 N. C. C. A. 889-905; 9 N. C. C. A. 466-482; 12 N. C. C. A. 1032-1037.

§ 220. Reduction, or Forfeiture of Compensation for Disobedience of Rules.

In *Gates v. Cottonseed Products Co. and Millers' Mutual Casualty Co.*, Ky. Workmen's Comp. Bd. Dec. Mar. 6, 1917, this question is squarely presented.

Section 3 Kentucky Act of 1916, in so far as it affects the point involved, is as follows: "Notwithstanding anything hereinbefore or hereafter contained no employee or dependent of any employee shall be entitled to receive compensation on account of any injury to or death of an employee caused by a willful self-inflicted injury, willful misconduct or intoxication of such employee."

Section 29 of the Act, in so far as it affects the point involved, is as follows: "Where the accident is caused in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer, or to obey any lawful and reasonable rule, order or regulation of the Board or the employer for the safety of employees or the public, the compensation for which the employer would have otherwise been liable under this act, shall be decreased 15 per cent in the amount of each payment; provided, however, that nothing in this section shall be construed to conflict with or impair any of the provisions of Section 3 of this Act."

The facts of the case were as follows: Frank Gates was working in the tunnel of a seed house. Along the floor of this tunnel runs a screw conveyor, enclosed in a box 18 inches deep by 18 inches wide, leaving about two feet of floor space along each side. This conveyor box is covered

with iron bars set at 3-inch centers, except that where the hangers for the conveyor shaft are placed the space between the gratings is between four and one-half and six inches. The employer adopted a rule forbidding all persons to walk on the conveyor gratings and made a custom of explaining this rule to each employee personally when hiring him. The foreman also made it a point to order any one off the conveyor whom he saw walking on it, and told other employees to warn each other to keep off this conveyor. Gates admitted the knowledge of the rule and the fact that the foreman had instructed him not to walk on this conveyor. There was testimony to the effect that the foreman had warned Gates not to walk on this conveyor on the morning of the accident and that a fellow-workman had seen him walking on it five minutes before the accident and had warned him off.

In walking on this conveyor in direct violation of the rules one of Gates' feet slipped through the bars in some way and was so badly injured that the amputation of the leg was necessary.

A part of the opinion of the Board is quoted as follows: Commissioner Caldwell said:

"There being no issue in the evidence as to the fact that plaintiff intentionally walked upon the conveyor grating in direct disregard of specific instructions given him by both the superintendent and the foreman, it is manifest that there must be either a 15 per cent forfeiture of compensation under Section 29, or a total forfeiture under Section 3 if the plaintiff's actions amount to willful misconduct within the meaning of the act. What is 'willful misconduct' is necessarily a mixed question of law and fact. Like 'reasonable care,' 'gross negligence,' and similar legal terms, it is not susceptible of being abstractly defined in terms which would with uniform certainly fix a line of demarcation between what would be 'willful misconduct' and what would not, in advance of the particular act upon which it is to be predicated. It will always be necessary in passing upon

each case to take into account the peculiar facts and circumstances of that case as it may arise, along with such fixed rules of construction as it may be practicable to establish in advance.

It may be said, however, that 'willful misconduct' is to be clearly distinguished from the 'contributory negligence' which is a defense at common-law. It is not enough that the employee may have been negligent, even to the extent that the injury is caused solely by his own negligence. 'Willful misconduct' implies positive wrong-doing rather than negligence. This does not mean that the act done necessarily must be legally criminal in its nature, or involve moral turpitude, since it is readily possible for a given line of conduct to constitute willful misconduct on the part of the employee without approximating either. It would be difficult to conceive a situation more aptly illustrating the difference between the contributory negligence and willful misconduct than the direct and open defiance by the employee of a specific order of the employer forbidding the doing of a given act, as has occurred in this case. In persisting in walking on the conveyor grating in direct and intentional disobedience of a several-times repeated order from his superintendent and foreman, no element of negligence or failure is involved; the act is not only misconduct, but is also obviously willful. To require the employer to compensate an injury received as a result of such actions would be to deny the employer any authority in the conduct of his business, for the safe conduct of which the law holds him responsible.

In determining whether to apply the total forfeiture provision for willful misconduct, or the 15 per cent forfeiture for the intentional failure to observe a reasonable safety rule of the employer, it is sufficient to say that the facts of each case will have to determine. That a given state of facts includes all the requirements for the lesser penalty does not necessarily imply that it may not reach further and fall also within the operation of the greater.

The presence in the Kentucky Act of the 15 per cent penalties of Section 29 was due to the fact that, under the earlier acts, the contributory negligence of the injured employee did not constitute a defense to any part of the compensation liability, whereas his willful misconduct invoked a total forfeiture of all of it. There was no equitable way of reaching those of cases which lay within the zone between these two extremes. The affording of an intelligent means of reaching that character of case, does not, however, in any degree impair the effect of the other provisions of Section 3 of the law when a case falls clearly within them. An express provision for such a contingency is reserved in the last sentence of Section 29, which concludes: 'Provided, however, that nothing in this section shall be construed to conflict with or impair any of the provisions of section three of this act.'

"That degree of positive wrongdoing which would constitute willful misconduct within the meaning of the Compensation Act does so just as readily with Section 29 in the law as it would without it."

§ 221. Willful Negligence of Employee.

The case of *Taylor et al. v. Seabrook*, 87 N. J. L. 407, 94 Atl. 399, 11 N. C. C. A. 710, was a proceeding under the New Jersey act. Compensation was awarded for death which resulted from the fall of a masonry pier in a cellar which the employee was digging out. The employer contested the award on the ground, among others, of the willful negligence of the employee, but the court held that there in no provision as to willful negligence in the law applicable to cases of compensation, but only to those coming under the liability section of the statute; as to this the court said:

"The first ground urged for a reversal is that the accident was due to the willful negligence of the deceased. We think counsel misapprehends the provisions of the act of 1911, so far as they relate to willful negligence. All that that act says on this subject is contained in the portion of the act designated as section 1, which may be called, for

convenience, the employer's liability section of the statute. In this part of the act the liability is made to depend, not upon any implied contract for compensation, but upon the negligence of the employer, either at common law or resulting from the requirements of the act itself. When we come to section 2 we find that the provision of willful negligence is entirely omitted, and that the only exemption is when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury."

§ 222. Intoxication as a Defense.

The cases dealing with intoxication of the employee at the time of the injury as a defense against compensation, are often treated under the head of "willful misconduct" and properly so, for it is a species of misconduct. Yet intoxication at the time of the injury will, under many acts, by itself, bar a recovery although without it the defense of "willful misconduct" could not be established. Usually intoxication must be the contributing cause, or the proximate cause, or one of the causes of an injury, but in Maryland it must be the sole cause. It has also been held under acts where intoxication was not specifically mentioned as a defense, that compensation for injuries received while under the influence of liquor should be denied because the accident did not arise "out of" the employment. *McCrae v. Renfrew*, 7 B. W. C. C. 898; *Murphy v. Cooney*, 7 B. W. C. C. 962; *Horsfall v. The Jura*, 6 B. W. C. C. 213; *Frith v. The Louisiana*, 5 B. W. C. C. 410; *Nash v. The Rangatira*, 7 B. W. C. C. 590; *Obrien v. Star Line*, 1 B. W. C. C. 177. (See L. R. A. 1916A (note) 351.)

Nekoosa-Edwards Paper Co. v. Industrial Com. of Wis., 154 Wis. 105, 141 N. W. 1013, L. R. A. 1916A 348, is the leading case under the Wisconsin act. The Wisconsin act does not specifically state that intoxication bars compensation although proof of this fact diminishes the award by fifteen per cent. The statute provides compensation "where the injury is proximately caused by accident, and is not so

caused by willful misconduct." It also provides that the findings of fact made by the board acting within its powers shall, in the absence of fraud, be conclusive. The circuit court of Dane County set aside the award of the commission on the ground that it had acted in excess of its powers in making the award. The supreme court of the State, three judges dissenting, reversed the judgment of the court below and directed that the award of the industrial commission be affirmed. The court, said, in part:

"It is quite possible for a person to be in an intoxicated condition which condition proximately caused the accident which proximately caused the death and yet not be guilty of willful misconduct. The drinking of intoxicating liquor is willful in the sense of intentional, but the mere fact of drinking is not misconduct. By section 1561 any person found in any public place in such a state of intoxication as to disturb others, or unable by reason of his condition to care for his own safety or for the safety of others, is guilty of a misdemeanor. This is misconduct and if one intentionally put himself in this condition he might be said to be guilty of willful misconduct. But there are many cases where although the drinking is intentional the intoxication is not, as for instance where one by reason of fatigue, hunger, sickness, or some abnormal condition becomes intoxicated in consequence of imbibing a quantity of liquor which ordinarily would not so affect him. While intoxication in such case to the degree specified might be a misdemeanor under the statute quoted it is not necessarily willful misconduct within the compensation act. The intoxication might under such circumstances be the proximate cause of an accident resulting in injury or death and yet not have reached that degree specified in this statute as in case where it produced mere drowsiness.

There was evidence in the instant case that deceased was slightly intoxicated, that he drove out of the clay pit standing up on his load, that he was perfectly able to take care of himself and drive his team when last seen alive.

There was, therefore, room to find upon the evidence not only with respect to the degree of intoxication, but that there was no intention or purpose to put himself in a dangerous or helpless condition of intoxication. The industrial commission has jurisdiction to pass on these very questions, and their finding above referred to does determine these questions. It finds that Smith was in an intoxicated condition which proximately caused the accident but that the accident was not caused by willful misconduct. This means that he did not willfully bring upon himself such degree of intoxication.

If we were authorized to review the evidence we might come to a different conclusion. But the statute is mandatory that the award shall not be set aside on such ground. The industrial board has jurisdiction to decide whether or not the intoxication which caused the death or injury was willful, consequently it did not act in excess of its powers in deciding the negative in the instant case. There is no claim that the award was procured by fraud and the findings of fact support the award. Hence, without reaching the interesting questions put forward in the briefs of counsel, we reverse the judgment of the circuit court and direct that the award of the industrial commission be affirmed."

The dissenting opinion was prepared by Judge Barnes. Inasmuch as the prevailing opinion conceded that "if we were authorized to review the evidence we might come to a different conclusion," the views of the dissenting judges are in part reproduced as follows:

"The plain unvarnished tale in this case is that Smith, an habitual toper, left his work, went to a saloon some distance from his place of employment, got a partial 'jag' on, started back with a bottle of whisky, and got so drunk that thereafter, while he was driving his team over a smooth road, he fell off the wagon and broke his neck. The commission did not find that the deceased got drunk by accident. There was no evidence in the case to warrant any

such finding. It did not award damages on any such theory. It plainly says so in its decision. After holding that the claimant was drunk at the time he fell off the wagon and that the drunkenness caused his death, it says: 'The question we have to decide is whether or not such intoxication is a defense against compensation.' And in conclusion the commission says: 'If the legislature had so intended, we believe that it would have specifically so provided in the act.'

It was not found that the deceased got drunk on an unusually small allowance of liquor because of sickness, hunger, or any other reason. Such a finding would totally lack support in the evidence. Where a party accustomed to the use of liquor drinks it until he gets drunk, the presumption is that he intended to do just what he did do. It was for the claimant to show by some facts or circumstances that for some reason or other the deceased drank less liquor than was ordinarily necessary to produce stupefaction in the instant case. No such evidence was produced. I think the circuit court was clearly right in holding that there could be no recovery, and that the commission would have reached the same conclusion had it construed the law as the circuit court did and as this court does. The judgment of the court is based on a finding of fact which the commission did not make, to wit, that the deceased did not intend to get drunk. What the commission in reality concluded was that intention was immaterial because an allowance might be made for an injury resulting from intentional intoxication."

In *State v. District Court of Meeker County* 128 Minn. 221, 150 N. W. 623, it was held that the employee came to his death by an accident in the course of his employment and not because he was intoxicated. His death was caused by the overturning of an automobile which he was driving. There was evidence both ways on the question of intoxication and sufficient evidence that he was not intoxicated to justify the trial court in so holding.

In *American Ice Co. v. Fitzhugh et al.* — Md. —, 97 Atl. 999, the court said that under the Maryland act, "the injury for which compensation is sought must be due exclusively or entirely to the intoxication of the employee in order to constitute a defense to the claim."

In *Collins v. Cole* 99 Atl. 830 (R. I.), it was held that when a watchman on a dredge was intoxicated at 5 o'clock and when he later, being on duty at 6 o'clock, made several trips to shore and became more drunk so that he rowed his boat in the wrong direction and later drank more whiskey, his dependents could not recover for his death in an attempt to rescue a man in similar condition, when in attempting the rescue he stands up in a tippy skiff, overturns it and drowns.

Under the California act in a decision of the board in *Arnold v. Benjamin*, 1 Cal. Ind. Acc. Comm. Bul. (No. 22, 1914) 44; 9 N. C. C. A. (note) 254, a painter who fell from a scaffold, admitted he had indulged in but denied he was under the influence of liquor. The board said: "While no general rule can be announced to cover cases in which intoxication is pleaded as a defense, we deem it of importance to indicate with certainty the policy to be pursued by the commission with reference to each particular case in which this defense is set up. Intoxication does not mean a condition of drunkenness resulting in helplessness. It can only be the proximate cause of the accident in cases where it is the major contributing cause of the accident. We do not deal with degrees of intoxication. We do announce that where the indulgence in intoxicants results in the impairment of a workman's faculties, which he would ordinarily use to safeguard himself against danger when he is working with dangerous appliances or necessarily working in an obviously dangerous place, requiring the exercise of those faculties, and it is plain that the impairment of those faculties as the result of intoxication is the major contributing cause of the accident, such intoxication will be held to be the proximate cause of the accident and the

benefits of the law will be withheld. We believe that the legislature has expressed a plain intention that no industry shall be charged with the burden of indemnifying an injured employee whose injury is proximately caused by intoxication as here defined."

The Court of Appeals in *National Council of Knights and Ladies of Security v. Wilson*, 147 Ky. 296, 143 S. W. 1000, Thomas' Kentucky Words and Phrases, p. 267, defines this term as follows: "Intoxication is a term which in its everyday application, is given a very broad meaning. To some men it means being under the influence of the intoxicant to such an extent as to render the person helpless; while others speak of one as intoxicated when slightly under the influence of the intoxicant. Webster defines it as 'State of being drunk, inebriety, drunkenness.'" "

For other cases on this subject, see L. R. A. 1916A (note) 351, 9 N. C. C. A. (note) 245-263.

§ 223. Malingering as a Defense.

The fact that a claimant is feigning disability may always be established by the employer to defeat compensation. It may be proved in the first instance to escape the payment of any compensation, or it may be set up as a defense to the further paying of compensation already allowed. Of course, the testimony in the nature of the case, is usually almost altogether medical. But any actions of the injured man inconsistent with the character of the disability for which he is claiming or receiving compensation are competent to establish the defense. Whether or not a man is malingering is a question of fact.

In *Silcock & Sons v. Golightly*, 1 K. B. 748, 111 N. C. C. A. 31, the opinion of Lord Cozens-Hardy, with which the other judges of the Court of Appeal of England agreed, is in full as follows:

"This is an appeal from a decision of the learned County Court Judge, who has reduced compensation payable in respect of an admitted accident from 11s a week to 7s 6d a week.

Now that the man met with an accident when he was employed is quite clear; he lost his right arm, and compensation has been paid for a long time. The employers seek to review, and they say: The man comes into Court, the Judge sees him, he is a young man, he is a strong man, he is a healthy man; and the evidence which was brought before the learned County Court Judge at Liverpool was quite clear that not merely on one occasion but on several occasions—I think it must be taken frequently—he walks about and carries baskets of pigeons belonging to his brother-in-law and to himself. He does that, and it is not a case of a man who is physically weak and physically unfit; it is a case of a man who, but for the loss of an arm, would be apparently a vigorous able-bodied man.

What has happened since 1909—that is five years ago—is that he has not only done no work, but he has not even sought for any work to do; he has not inserted or answered any advertisements or made any application for work. I think it is really a bad case of malingering. But although those are circumstances we can not disregard, it is not conclusive, of course, of the case. The real difficulty which I think we have all felt—certainly I have felt—in the case, is by reason of the authorities on this branch of the law which I feel some difficulty in altogether reconciling. There are three cases, which are—*Proctor v. Robinson* (80 L. J. K. B. 641; (1911) 1 K. B. 1004, *Anglo-Australian Steam Navigation Co. v. Richards* (4 B. W. C. C. 247), and *Cardiff Corporation v. Hall* (80 L. J. K. B. 644; (1911) 1 K. B. 1009.) It so happens that they were all tried before the court constituted in the same way. I was a dissident in one of the decisions—the Cardiff case. Those are decisions of the Court of Appeal. I should not be otherwise than glad if the ultimate tribunal should have the opportunity of settling the law on this branch of the case.

It is said by counsel for the appellant, who argued the case very well, that malingering had nothing to do with the present case; and he says there is no ground for re-

ducing the compensation unless it is shown not only that the man was able to do some sort of work, but to indicate some particular kind of work which he is able to do and which there is a reasonable prospect of his being able to obtain in the neighborhood. On the other hand it is said, Oh, this is a case in which the learned County Court Judge has great experience in Liverpool; Liverpool is a place where there are shipping industries and other kinds of employment to be found, and the Judge is entitled to take advantage of his own local knowledge, and he is not bound to require evidence to satisfy himself that the man—who has never tried to get suitable work—might have got it if he had tried.

On the whole I have come to the conclusion that we can not interfere with the decision of the learned County Court Judge. I think that he was entitled to take advantage of his own local knowledge and to say that, although this man is a left-handed man, he is not so disabled from earning anything that he should be allowed to be a pensioner for life receiving 11s a week from his employers, having the good fortune to have a wife who is earning 15s a week, and so live in comparative ease on an income of 26s a week doing nothing. I think we really ought not to encourage such conduct, and I think that the learned Judge was justified in saying, 'From my local knowledge I am satisfied that this is a man who is able to obtain light work in Liverpool if he wished to try.'

Of course, on some future occasion, if he should have made attempts—honestly and in good faith made them—and found himself unable to obtain any light work suitable for his infirmities, then it may be open to him to apply for, and it may be competent for the learned Judge to grant, an increase from the 7s 6d a week to the 11s. But I can not say that we are bound by the authorities which were cited to us to say that there was not evidence in this case of the man's physical condition and capacity; and that, coupled with the Judge's local knowledge, is sufficient to maintain

the award. For these reasons I think the appeal fails and must be dismissed."

§ 224. Malingering or Hysteria.

In *Santini v. Mammoth Copper Mining Co.* 1 Cal. Ind. Acc. Comm. Dec. 161, 11 N. C. C. A. (note) 32, the board said: "While there is some difference of opinion among the physicians testifying as to whether or not the paralysis of applicant's arm is wholly functional and due to hysteria, all agree that, up to the time of giving their testimony, applicant Santini has suffered a total paralysis of the right arm, and is unable to perform manual labor, and that he is not a malingerer. The difference between a malingerer and a hysteric is that the malingerer claims disability when he knows he has no right to do so, and the victim of hysteria claims disability in the unshakable conviction that he is disabled. In the language of Dr. McClenahan, an excellent authority on the subject, 'His injury is just as real to him as though it actually existed.'"

For note on Malingering see 11 N. C. C. A. 31-42.

§ 225. Burden of Proof.

Whether or not an act is willful is a question of fact. In *re Nickerson* 218 Mass. 158, 105 N. E. 604, Ann Cas. 1916A 790, 5 N. C. C. A. 645. The burden of proof for establishing willful misconduct is on the employer, *Maffia v. Aquilino*, 3 Cal. Ind. Acc. Comm. Dec. 15; likewise intoxication, *Ruprecht v. Red River Lumber Co.* 2 Cal Ind. Acc. Comm. Dec. 864. If it was denied that a claimant was an employee the burden would likely rest upon the employee to establish the relationship. In 1 *Greenleaf on Evid.* (15 ed.) § 74, it is said: "The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." The burden of proving that the accident causing injury or death arose out of and in the course of employment also rests on the claimant. *Thackway v. Connelly & Sons*, 3 B. W. C. C. 37.



The general rules of evidence concerning the burden of proof as applied in civil cases at common law will also be applicable here.

CHAPTER X

GENERAL TOPICS

Section.

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- 263. Act not effective outside of Massachusetts.
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§ 226. Administrative Boards or Commissions.

Some of the acts place the administration of them in one of the inferior courts but the majority of the laws create boards or commissions upon whom the responsibility of administration rests.

These bodies are not courts. *Greene v. Caldwell* 170 Ky. 571, 186 S. W. 648; *Mackin v. Detroit-Limkin Axel Co.* 187 Mich. 8, 153 N. W. 49; *Menominee Bay Shore Lumber Co. v. Industrial Com.* 162 Wis. 344, 156 N. W. 151, nor are the members judicial officers. *In re Hotel Bond* 89 Conn. 143, 93 Atl. 245; *In re Pigeon* 216 Mass. 51, 102 N. E. 932, Ann Cas. 1915A 737.

They were formed in order to expedite the administration of the act and do away with the technical and formal procedure and delays of a court of law. *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C 771.

The procedure before the boards is usually very simple and informal. Hearings are set at some place convenient to the parties and as soon as possible after the application has been made. The board or commission is usually empowered to subpoena witnesses, compel their attendance, administer oaths, hear testimony, and make findings of fact and law and base awards or orders upon them, review their own orders and awards, and reopen the case where a showing is made that a previous award is wrong because of fraud, mistake or change in conditions.

An application for review because the findings are not sustained by the evidence, and because the applicant has new evidence, justifies the Board in granting a rehearing, under the California Act. *Cordoba v. Pillsbury* 145 Pac. 1015.

Under the Minnesota Act hearings can be held at the

time and place fixed by the Judge regardless of the time and place fixed for holding regular terms of court. *State v. District Court of St. Louis County* 152 N. W. 838, 129 Minn. 423.

It is not the purpose of this work to go exhaustingly into the questions of procedure before the boards or commissions of the various States, as those questions are generally provided for specifically by the act or the rules of the board or commission, made under it and are questions largely of local interest.

In re American Mutual Liability Insurance Co. 215 Mass. 480, 102 N. E. 693, 4 N. C. C. A. 60, Ann. Cas. 1914D 372, it was said:

“The workmen’s compensation act has a procedure all of its own. Where the act is adopted by the parties, a relation arises between the employee and the employer, under which in the event of a personal injury to the employee there shall be speedy ascertainment of the new kind of compensation created by the act, coupled with a voluntary relinquishment by both parties of the right to trial by jury as to matters covered by the act. One main purpose of the act is to establish between employee and employer, in place of the common law or statutory remedy for personal injury, based upon tort, a system whereby compensation for all personal injuries or death of the employee received in the course of and arising out of his employment, whether through unavoidable accident or negligence or otherwise (except through his serious and willful misconduct), shall be determined forthwith by a public board, and paid by the insurer. For the accomplishment of these ends a simple method is furnished operating without delay or unnecessary formality. The practice should be direct and flexible in order to adapt the remedy to the needs of the particular case. In one aspect a case under the act resembles an action at law, for it seeks ultimately the payment of money. Payments, however, in most instances are by installments. In another aspect it is akin to the specific performance of

a contract, designed to cover the whole range of misfortunes likely to arise in the course of employment in a State with many and diversified industries. Moreover, the compensation is to be paid not directly by the employer, but by the insurer, who is either the 'Massachusetts Employers' Insurance Association' created by part 4 of the act or any liability insurance company authorized to do business within the Commonwealth. The employee has no immediate relation with the insurer. He is the beneficiary under a contract between the employer and insurer. A beneficiary under any instrument to which he is not a direct party more naturally looks to equity rather than to law for relief. Part 3, section 11, requires a 'decree' to be entered, and refers to the proceeding as a 'suit.' Giving due weight to the equitable phraseology employed in this section to the beneficent purposes of the act, which can be enforced better through the relief afforded by equity, and to the character of the proceeding itself and the parties thereto, it follows that in the main causes under the act in court should be treated as equitable rather than legal in nature, procedure and final disposition."

§227. Meaning of "All Questions Arising."

Some of the acts have a blanket clause by which the board is given jurisdiction over all questions arising between the employer and the employee, or some one claiming through him, concerning the liability for, or the amount or duration of, compensation.

The English act uses a similar phrase, and in construing it the court said: "There must, first of all, be a 'question' between the parties, and then there is another condition, which may or may not oust the jurisdiction—namely, that the question is not settled by agreement. . . . The mere giving of a notice of a claim for compensation did not raise a 'question' between the parties. The 'question' to be settled by arbitration must be a question as to the liability to pay compensation, or as to the amount or

duration of compensation." *Field v. Longden & Sons*, 1 K. B. 47, 4 W. C. C. 20, *Harper's Work. Comp.* § 192.

In another English case it was said. "The question raised in this case seems to me to be one of great importance, because it comes to this, whether an employer, perfectly willing to yield to the law and give the workman all that he is entitled to, can escape the penalty of litigation. In this case it is clear that the employer was willing to do everything that the law obliged him to do." *Jones v. Great Central Ry. Co.*, 18 T. L. R. 65, 4 W. C. C. 23, *Harper's Work. Comp.* § 192.

§ 228. The Board May Make Rules.

It would be impracticable for any act covering such a wide field as the compensation act does to deal specifically with every detail of procedure and administration. In many States boards or commissions are charged with the administration of the acts and in order to properly attend to this duty they are empowered to make any reasonable rules not inconsistent with the provisions of the act. Any subject upon which the legislature has not spoken in detail and which has to do with carrying out the provisions of the act is a proper subject for the board to rule upon. And these rules must be complied with by those electing to come under the provisions of the act. If the rules are deemed unreasonable or illegal, appeal can be had to the courts. If the act does not specifically state that the rules shall be reasonable, such a condition would doubtless be construed to be the intention of the legislature. For example the board could adopt forms upon which the different kinds of applications to the board should be made and issue a rule requiring these forms to be used in all cases.

In *Zappala v. Industrial Commission of the State of Washington*, 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A 295, the court said: "In so far as the commission has adopted any rules that pertain to the administrative features or those matters that are peculiarly within the control of the commission, the courts, we apprehend, will recognize its



right to do so. But this does not mean that in our interpretation of the true intent and purposes of the act on a pure question of law we are bound by any ruling of the commission. If so, there would be no purpose in the appeal to the courts provided by the act. Whenever the Industrial Insurance Commission interprets the law, that interpretation is reviewable in the courts, and while in any given case, as in this, the courts will give due respect to the rulings of the commission, they must finally act upon their own determination as to what the law means and the extent to which it is applicable."

§ 229. Findings of Fact Conclusive on Appeal.

Generally all awards or orders of the board or commission or court of original jurisdiction are, in the absence of fraud, conclusive and binding as to all questions of fact. But if it is found on appeal, that there is no evidence to warrant a finding of fact, the court may set aside the finding of fact made by the board. As was said in *Milwaukee Coke & Gas Co. v. Industrial Commission*, 160 Wis. 247, 151 N. W. 245, 8 N. C. C. A. 1077, "If there was substantial, credible evidence supporting the findings of the commission, the courts can not interfere."

In the case of *City of Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247, 8 N. C. C. A. 1076, it was said: "As a preliminary to the determination of each one of the questions raised, it is proper to again call attention to the fact that, in the absence of fraud, the findings of fact made by the industrial commission are conclusive, and its order or award can be set aside only upon the ground (1) that it acted without or in excess of its powers; (2) that it was procured by fraud; or (3) that its findings of fact do not support the order or award. In the present case the last two grounds are not relied upon. But it is claimed the commission acted without or in excess of its powers by making findings having no support in the evidence. If this be so, then there is an infirmity in the award that can be successfully reached and remedied upon

appeal. *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822. But it should be borne in mind that if in any reasonable view of the evidence, it will support either directly or by fair inference the findings made by the commission, then such findings are conclusive upon the court. . . It was not the scheme of the act to make the court a reviewer of facts. Its office is to relieve against fraud, to keep the commission within its jurisdictional bounds, and to correct an award not supported by the facts found."

The conclusiveness of the findings of facts by industrial boards is supported by the following cases: *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209, 3 N. C. C. A. 649, 37 L. R. A. (N. S.) 489; *Milwaukee Western Fuel Co. v. Ind. Comm.*, 159 Wis. 635, 150 N. W. 998; *Oldenberg v. Ind. Comm.*, 159 Wis. 333, 150 N. W. 444; *Smith v. Ind. Acc. Comm.*, 26 Cal. App. 560, 147 Pac. 600, 8 N. C. C. A. 1066; *Poccardi v. Public Service Comm.*, 75 West Va. 542, 84 S. E. 242, L. R. A. 1916A 299, 8 N. C. C. A. 1065; *Hotel Bond Co.'s Appeal*, 89 Conn. 143, 93 Atl. 245, 8 N. C. C. A. 1068; *Cain v. Nat. Zinc Co.*, 94 Kan. 679, 146 Pac. 1165, rehearing denied, 148 Pac. 251; *In re Fischer* 220 Mass. 581, 108 N. E. 361, 8 N. C. C. A. 1071; *Johnson's Case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843; *Weber v. American Silk Spinning Co.*, (R. I.) 95 Atl. 603; *Buckley's Case*, 218 Mass. 354, 105 N. E. 979, 5 N. C. C. A. 613; *Rayner v. Sligh Furniture Co.*, 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A 22, 4 N. C. C. A. 851; *Goldstein v. Center Iron Works*, 167 App. Div. 526, 153 N. Y. Supp. 224; *Sexton v. Newark Dist. Teleg. Co.*, 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569, affirmed 86 N. J. L. 701, 91 Atl. 1070; *Nelson-Spelliscy Imp. Co. v. Dist. Ct.*, 128 Minn. 221, 150 N. W. 623. *In re Septimo* 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906; *In re Savage* 222 Mass. 205, 110 N. E. 283; *Crowley v. City of Lowell*, 223 Mass. 288, 111 N. E. 786; *Papinaw v. Grand Trunk Ry. Co.* (Mich.) 155 N. W. 545; *Deem v. Kalamazoo Paper Co.* (Mich.) 155 N. W. 584; *Platt v. Central N. E. Ry Co.* 169

App. Div. 826; 155 N. Y. Supp. 854; *Eagle Chemical Co. v. Novak*, 161 Wis. 446, 154 N. W. 631; *First Nat'l Bank v. Ind. Com. of Wis.* 161 Wis. 526, 154 N. W. 847.

Where the Court sent a case back to the Industrial Board for them to complete the record according to the facts, the Board had no authority to make a new finding but could merely complete the record and return it. *In re Doherty* 222 Mass. 98, 109 N. E. 887.

The mere fact that evidence was weak and unsatisfactory to support the contention that a sister was partially dependent upon a brother could not, or was not sufficient to disturb the finding of fact where there was some evidence to support it. *State v. District Court of Ramsey Co.* 156 N. W. 120 (Minn.)

A finding of fact which is warranted by the evidence will not be set aside by the court, even though it would have been inclined to decide differently from the Board. *In re Von Ette* 223 Mass. 56, 111 N. E. 696.

Where a finding of fact by a commission is not based on facts proven and admitted, or an inference reasonably deducible therefrom the finding may be reversed as an error of law. *Gardener v. Horseheads Const. Co.* 171 App. Div. 66, 156 N. Y. S. 899.

A finding of fact by the Industrial Board, under the Mass. Act stands on the same footing with the verdict of the jury or finding of the court, and will not be set aside unless wholly unsupported by the evidence—*In re McPhee* 222 Mass. 1, 109 N. E. 633. *In re Diaz* 217 Mass. 36, 104 N. E. 384, 5 N. C. C. A. 609.

Hearsay evidence alone is not sufficient to support a finding of fact. *Englebreton v. Indus. Acc. Comm.* 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545.

See further *L. R. A.* 1916A 266-267; 8 N. C. C. A. 1065-1077, 10 N. C. C. A. 545-561.

§ 230. Findings of Law Not Conclusive on Appeal.

While findings of fact are binding upon the courts where there is evidence to support them, findings of law are not. This proposition is so generally accepted as to make the citation of authorities to support it almost unnecessary. In *Hulley v. Moosbrugger* 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C 1203, it was held that the questions of law arising upon the facts found were reviewable on appeal.

§ 231. Rules of Evidence.

Section 47 of the Kentucky Act provides that "Processes and procedure under this act shall be as summary and simple as reasonably may be." Section 50 of that act provides that disputes shall be determined "in a summary manner." "The board may make rules not inconsistent with this act for carrying out the provisions of this act." (See section 47 of that act.) Nowhere is it stated that the regular rules for the production of evidence can be disregarded, but the probable intention was not to hamper the board in getting at the true facts by confining them altogether to the technical rules of evidence. This seems to have been the intention of the framers of most of the acts now in force.

It has been held that an award can not be based on mere conjecture or surmise or alone on hearsay evidence. *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C 771, 5 N. C. C. A. 917, also that the hearsay rule is not a technical rule of evidence. *Employers' Assur. Corp. v. Industrial Acc. Comm.* 170 Cal. 800, 151 Pac. 423. This was under a provision in the California act that the commission was not to be bound by the technical rules of evidence. In *Pigeon's Case* 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516, it was said under the Massachusetts act: "As exceptions do not lie under the Workmen's Compensation Act and the only way to bring questions of law to this court is by appeal, it follows that the general equity rule as to consideration of questions of evidence raised at a hearing before the chancellor ought to be followed. Such ques-

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tions seasonably presented upon the record will be considered, but a decree will not be reversed for error in this respect unless the substantial rights of the parties appear to have been effected.”

If there is any basis in the competent evidence upon which to fasten an award, it will not be reversed merely because of the introduction of evidence that would be incompetent in a court of law. *Englebreton v. Ind. Acc. Comm.* 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545; *Fitzgerald v. Lozier Motor Co.* 187 Mich. 660, 154 N. W. 67; *First Nat. Bank v. Ind. Comm.* 161 Wis. 526, 154 N. W. 846. The New York court in *Carroll v. Knickerbocker Ice Co* 169 App. Div. 450, 155 N. Y. Supp. 1, has taken a view contrary to the above. But this was reversed in 218 N. Y. 435, 113 N. E. 507. See further, L. R. A. 1916A (note) 267-268.

In proceedings before the Michigan Industrial Board a memorandum of a foreman, to the effect that the deceased had received an injury, was admissible as an admission against interest. *Fitzgerald v. Lozier Motor Co.* 187 Mich. 660, 154 N. W. 67.

The burden of proving the facts necessary to establish a claim under the act is on the claimant. *Corral v. Hamlyn & Son*, 94 Atl. 877. (R. I.)

An award can not be made under the Wisconsin Act where the evidence is such that the award must be based on conjecture as to whether or not an infection, causing the loss of an eye, was received by an injury in the course of his employment. *Voelz v. Industrial Commission of Wisconsin* 161 Wis. 240, 152 N. W. 830.

If the plaintiff can only show a state of facts upon which compensation could be denied or granted with equal consistency, there can be no award. *In re Savage* 222 Mass. 205, 110 N. E. 283.

The evidence offered by one attempting to prove how an accident causing death occurred is not limited to direct proof, but the fact may be established by circumstantial evidence. *In re Von Ette* 223 Mass. 56, 111 N. E. 696.

The Appellate Division has the right under the New York Act to consider all the evidence introduced before the commission upon which an award was made, supplementing and explaining, though not contradicting the finding of fact made. *Gleisner v. Gross & Harbener*, 170 App. Div. 37, 155 N. Y. Supp. 946.

An award of the Commission based on a finding of fact made entirely without evidence that the employee was injured in the course of his employment was improper, in spite of the presumptions of the law to the contrary. *Collins v. Brooklyn Union Gas Co.* 171 App. Div. 381, 155 N. Y. Supp. 957.

An employer's notice of accident is competent prima facie evidence of the facts therein stated, but it may be contradicted. *First National Bank of Milwaukee v. Ind. Comm.* 161 Wis. 526, 154 N. W. 847.

Under the Illinois Act the inquest of the coroner or the finding of the coroner's jury are competent evidence as to the cause of death. *Armour & Co. v. Ind. Bd. of Ill.*, 273 Ill. 590, 113 N. E. 138. It was so ruled because a proceeding under the Workman's Compensation Act takes the place of the ordinary action at law for negligence in which such evidence was allowed. *Victor Chemical Works v. Ind. Bd. of Ill.*, 274 Ill. 11, 113 N. E. 173.

For note on sufficiency of evidence in the absence of eye witnesses see 10 N. C. C. A. 618-645.

§ 232. Right of Board to Hear Evidence.

In *Pigeon v. Employers' Liability Assurance Corp'n, Ltd.*, 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516, a question was raised as to the admissibility of evidence received at the hearing, the answer turning on the nature of the proceedings before the industrial accident board and its status as a body, it being argued that neither the commission on arbitration nor the industrial accident board is a court within the meaning of the State statutes. As to this Judge Rugg said:

"Plainly neither is a court in the strict meaning of the word. See Opinion of Justices, 209 Mass. 607, 612, 96 N. E. 308. The members are not 'judicial officers' within the Constitution. Part 2, c. 3, art. 1. But they are given authority to summon witnesses, administer oaths, hold hearings, take testimony, examine evidence, make rulings of law and findings of fact, and render decisions. See part 3 of the act. Their decisions may be enforced by appropriate proceedings in courts. The power to take testimony and make rulings of law which are subject to review by the judicial department of the Government goes far to indicate that in performing those functions they are to be guided and controlled by the same general principles which would govern judicial officers in discharging the same duties. The workman's compensation act in its practical operation affects large numbers of people. Its declared purpose is the humane one of preventing industrial accidents and providing payments for employees injured in the course of employment. It is substitutional in character for the common-law remedy for a class of injuries formerly adjusted by actions at law. The word 'court' has been used in statutes with a broader significance than including simply judicial officers. See *Aldrich v. Aldrich*, 8 Metc. 102, 106. It may be given a signification liberal enough to include the committee on arbitration and industrial accident board as constituted by the act, and under all the circumstances should be given such construction.

It is further contended that that section of the statute is inapplicable because a proceeding under the workmen's compensation act is not an 'action,' and hence the declaration of the deceased can not have been made 'before the commencement of the action.' Here again the definition urged is too narrow. Action is here used in its comprehensive sense as meaning the pursuit of a right in a court of justice without regard to the form of procedure. (*Boston v. Turner*, 201 Mass. 190, 196, 87 N. E. 634.) A proceeding under the act contemplates ultimate enforcement in a

judicial court and a declaration made before the institution of proceedings under the act is made before the commencement of the action."

§ 233. Letters Rogatory as Evidence.

In *re Martinelli* (Mass.), 106 N. E. 557, Sylvio Martinelli, as administrator, petitioned the superior court of Hampden county to issue letters rogatory to obtain the testimony of witnesses in the Kingdom of Italy to be used in hearings before the industrial accident board for the recovery of payments under the workmen's compensation act for the death of two persons for whose estates he was administrator. The petition was granted in the trial court, and the insuring company concerned took exceptions thereto and appealed the case, the appeal resulting in the action of the court below being reversed.

Speaking of the uses of letters rogatory, and the power of a court to issue the same, Judge Rugg said:

"Letters rogatory as a means of procuring the evidence of witnesses in foreign States are not much in use in this Commonwealth. The statutes make ample provision to this end by means of depositions. The power to issue a commission rogatory in order to prevent a failure of justice is inherent in a court. But it always has been recognized that such power can be put forth only in aid of a cause actually pending in the court, which issues the letters.

It is not averred in the application nor contended in argument that the proceedings before the industrial accident board are pending in the superior court. Manifestly they are not so pending. The machinery of the workmen's compensation act does not contemplate the ascertainment of facts in that court.

It is not within the power of a court, even of general jurisdiction, to issue letters rogatory to obtain testimony to be used before a tribunal over whose procedure and trials it is given no authority until the case itself may be brought before it for review. Therefore, it is not within the author-

ity of the superior court to procure evidence for use before a tribunal over whose proceedings it has no more intimate supervisory power than it has over the industrial accident board."

§ 234. Death Resulting From Injury.

If dependents are making claim for the death of an employee, the burden is upon them to prove that the death resulted from the injury. In the English case of *Dunham v. Clare*, 2 K. B. 292, 4 W. C. C. 102, the court of appeal said: "The only question is whether the death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from an injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after consequences. . . . If no new cause, no *novus actus* intervenes, death has in fact resulted from the injury."

§ 235. Proof of Liability for Compensation.

Usually, before an employer is liable for compensation the following circumstances must be established by evidence sufficient to justify an affirmative finding of fact to that effect:

1. That the relation of employer and employee existed within the meaning of the act.
2. That the statutory provisions concerning acceptance or rejection of the act have been met.
3. That the employee suffered a personal injury by accident or a personal injury when the act does not use the word accident.
4. That the injury or the accident causing the injury arose both "out of" and "in the course of" the employment or within the coverage clause used by the act in the place of the above phrase.

5. In case of death, in addition to the above, that the death resulted from the injury or was the natural or probable consequence thereof and so resulted within the limitation period provided by the act.

6. In case dependents are seeking compensation they must show themselves to be within the conditions where dependency is presumed or else show a degree of actual dependency.

§ 236. Agreements, Settlements or Releases.

Generally an employer and employee working under an act, or the employer's insurer and an employee, may agree upon compensation so long as the terms agreed upon are within the terms of the act. One of the underlying purposes of this legislation is to encourage amicable settlements wherever possible. The employer must deal at arms' length with the employee and must not take advantage of the employee's ignorance of the law, *Carpenter v. Detroit Forging Co.* (Mich.) 157 N. W. 374. The terms of the act must be followed. *In re Pigeon*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A 737, 4 N. C. C. A. 516; *In re Cripps*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B 828; *Barry v. Bay State Ry. Co.*, 222 Mass. 366, 110 N. E. 1031. Generally an agreement to settle amicably made in good faith, without fraud or misrepresentation, will be upheld. But many of the acts provide that no settlement is binding or final until filed with the board or court for approval and approved. Such provisions have been approved by the courts, *State ex rel., Duluth Diamond Drilling Co. v. Dist. Court*, 129 Minn. 423, 152 N. W. 838, 9 N. C. C. A. 1119. An employer can make voluntary payments of compensation without a formal agreement, and, can at his own risk, make agreements without filing them for approval where this is required, but in such a case the employer's liability is not discharged until the statute of limitation has barred the employee's right to make claim, and usually even the statute of limitation would

not run against the employee if a fraud had been practiced upon him in the making of the settlement.

Generally when the agreement is approved by the board or court it becomes the award or judgment as the case may be, and is enforceable as other awards or judgments are. *Spooner v. P. D. Beckwith's Estate*, 183 Mich. 323, 149 N. W. 971.

A great many of the statutes provide specifically that where there is a showing of fraud, mistake or change in conditions a previous award may be reviewed and set aside.

For note on agreements between employer and employee, see 7 N. C. C. A. 798-813.

§ 237. Releases.

Generally speaking a release in full given to the employer, by the employee, with full knowledge of his rights, will bar a further claim for that injury.

A release by a widow does not bar the claims of dependent children of a deceased employee under the New Jersey Act, *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. Law 102, 95 Atl. 753.

In Massachusetts it has been held that the employee's settlement with a third person for injuries caused by him cannot defeat the widow's claim under the act when he subsequently dies of those injuries. *In re Cripp*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B 828.

And in Wisconsin a release from an employee before death, to his employer, cannot bar his widow's claim under the act as a dependent when he dies of those injuries. *Milwaukee Coke & Gas Co. v. Ind. Comm. of Wis.*, 160 Wis. 247, 151 N. W. 245.

An employee who agreed to a settlement for partial disability on arbitration later claimed total disability before the board on appeal. It was held that he was not precluded from making such a claim. *Duprey v. Maryland Casualty Co.*, 219 Mass. 189, 106 N. E. 686.

An agreement between an employee and the employer's

insurer for compensation for the loss of three fingers, although approved by the industrial board, does not bar an award by the board for injury rendering the hand permanently incapable of use. *Lemieux v. Contr. Mutual Lia. Ins. Co.*, 222 Mass. 346, 111 N. E. 782.

A settlement between an employer and employee releasing the employer from all claims on account of the injury does not bar the employee from suing the physicians who treated him for malpractice. *Viita v. Dolan*, 155 N. W. 1077 (Minn.).

Where an attorney consented to an award made by the New York commission, it was held that the award should stand, although the employer and his insurer claimed that the attorney had exceeded his authority in agreeing to the award. *Cunningham v. Buffalo Copper & Brass Rolling Mills*, 155 N. Y. Supp. 797.

A proceeding to set aside confirmation of compromise under Statute 1915, Section 2394-15, within one year held valid in spite of Section 2394-19, requiring appeals from boards to be taken within twenty days. *Menominee Bay Shore Lumber Co. v. Ind. Comm. of Wis.*, 156 N. W. 151.

A release under the act by a guardian of a minor does not bar an action for damages where the minor was illegally employed. *Stetz v. F. Mayer Boot & Shoe Co. (Wis.)*, 156 N. W. 971.

A release given by the employee to his employer will not discharge the liability of a third person whose negligence caused the injury. *Jacowicz v. Delaware, L. & W. Ry. Co.*, 87 N. J. L. 273, 92 Atl. 946, Ann. Cas. 1916B 1222.

§ 238. Failure to Agree Must Precede Application for Hearing.

Generally the employer and the employee must show that they are unable to agree on compensation before the board or court will adjust their differences.

It was said in *State Ex rel Duluth Diamond Drilling Co. v. Dist. Ct.*, 129 Minn. 423, 152 N. W. 838, 9 N. C. C. A.

1123, "Either party may take the initiative, but, if neither will do so, there is a 'failure to agree upon a claim for compensation' within the meaning of the statute. The statute contemplates that the court shall supervise and control all matters and proceedings arising under the act. In case the parties effect an amicable settlement, such settlement must be presented to the court, and be approved by him as in accordance with the act, before it becomes valid and binding; in case they become involved in a dispute over, or fail to agree upon the terms of settlement, either party may call upon the court to hear and determine the matter. The court has jurisdiction over all cases arising under the act—both those in which the parties agree, and those in which they do not agree—not merely those in which one party makes demands to which the other refuses to accede."

§ 239. Lump Sum Settlements.

The acts, almost without exception, allow payments of compensation, under certain conditions, to be commuted to a lump sum. Usually, however, no lump sum settlement can be made unless the agreement of the employer and the claimant to that effect is submitted for approval to a court or administrative board. The provisions of the act under consideration must be considered to determine the conditions under which such a settlement can be made.

One of the purposes of the acts is to provide a regular income for the support of the family of a workman who has been incapacitated by accident in the employment and to protect him and his family against the squandering of money which would in a majority of cases result without this safeguard. On the other hand, there may be instances when it will be to the advantage of all concerned to commute payments.

Whether or not it is advisable to make such a payment is a question of fact, and it has been held in England that the amount of the lump sum to be paid is also a question of fact. *Stavely Coal & I. Co. v. Elson*, 5 B. W. C. C. 301;

Pattinson v. Stevenson, 2 W. C. C. 156; *Grant v. Conroy*, 6 W. C. C. 153, all cited in L. R. A. 1916 A (note) 173. The employer is usually allowed a discount upon the total sum of probable future payments. Upon the payment of the lump sum, all liability under the act for the accident and injuries concerned is discharged.

Under the Kentucky Act compensation can, except in the case of alien dependents (see section 22 of the act), under no conditions be commuted to a lump sum payment until after it has been paid for six months or more, and then only on order of the board after application of either party, the other having been given proper notice (see section 23 of the act). After a hearing it is for the board to determine whether on all the facts a lump sum payment should be made.

Under the Kansas Act, in the case of *McCrackin v. Missouri Valley Bridge & Iron Co.*, 96 Kan. 353, 150 Pac. 832, George M. McCracken was a common laborer in building a bridge and was in the employ of the company named. On December 29, 1914, he was killed in the course of his employment. Employer and employee were subject to the provisions of the workmen's compensation act. His wages were 25 cents per hour and he worked eight hours per day. Ellen McCracken, the mother and sole heir of the employee, proceeded against the company for compensation and procured an award of a lump sum of \$1,872, which was the amount of the earnings of the employee for three years at the rate of \$2 per day.

The court said: "It is said that judgment should not have been rendered in a lump sum, but that the plaintiff should have been awarded periodical payments according to her necessities, so that, in case of her death, any unpaid balance would be saved to the defendant. The statute leaves the character of the judgment to the discretion of the trial court.

"The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments

The first of these is the fact that the British Empire was not a static entity, but a dynamic one, which grew and changed over time. The second is the fact that the British Empire was not a homogeneous entity, but a heterogeneous one, which was composed of many different parts.

The third is the fact that the British Empire was not a purely economic entity, but a political one, which was based on the principle of the right of the British people to rule over other peoples. The fourth is the fact that the British Empire was not a purely military entity, but a cultural one, which was based on the principle of the right of the British people to spread their culture and values to other peoples.

The fifth is the fact that the British Empire was not a purely imperial entity, but a civilizing one, which was based on the principle of the right of the British people to bring civilization and progress to other peoples. The sixth is the fact that the British Empire was not a purely colonial entity, but a global one, which was based on the principle of the right of the British people to rule over the whole world.

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The eleventh is the fact that the British Empire was not a purely imperial entity, but a civilizing one, which was based on the principle of the right of the British people to bring civilization and progress to other peoples. The twelfth is the fact that the British Empire was not a purely colonial entity, but a global one, which was based on the principle of the right of the British people to rule over the whole world.

then due and prospectively due under this act, with interest on the payments overdue, or, in the discretion of the trial judge, for periodical payments as in an award.' (Laws 1911, ch. 218, sec. 36.)

In this case there is no possible hope for improvement like restoration of earning capacity to an injured workman. The son is dead. The mother was entirely dependent upon his earnings for her own continued existence, independent of charity. She is utterly destitute. She has no income or sources of income of her own. She is physically unable to earn her own living, and she is 62 years old. The statute gave her \$1,872. With this sum she must establish herself according to her helplessness, and then employ the remainder so that it may last to the end of her days, for she will never have any more. Probably the plaintiff can not attain her life expectancy, and the insurance company wants this judgment doled out to her in installments 'as her necessities require' so that, should she die soon, part of the judgment will not have to be paid.

The case was a typical one for the substantially automatic operation of the workmen's compensation law, and the bridge company was anxious to make compensation at once to the plaintiff for the loss of her sole means of support. But the insurance company informed the defendant that liability should be established in the court of last resort or the indemnity the defendant had purchased would not be paid. So an appeal had to be taken."

In *New York Shipbuilding Co. v. Buchanan*, 84 N. J. Law 543, 87 Atl. 86, this subject was treated. It is provided by the New Jersey compensation law of 1911 that, in the interests of justice, payments awarded may be commuted to lump sum payments. It is also provided that the trial judge who makes the original determination shall set forth in this determination a statement of the facts determined by him. A lump sum award had been made in the court of common pleas of Camden county, and the company liable therefor brought the case to the supreme

court on certiorari, the judgment of the court below being reversed. The grounds of the reversal were that the record of the case was not sufficient to give the reviewing court the necessary facts for determining the propriety of the commutation to a lump sum payment, so that the award of a lump sum was without legal support. The opinion concludes:

"The judgment will be reversed and the record remitted to the common pleas for an ascertainment by said court, based on facts found from legal evidence, of the propriety or otherwise of commuting the weekly payments to a lump sum."

Under the same law in the case of *Mockett v. Ashton*, 84 N. J. Law 452, 90 Atl. 127, 4 N. C. C. A. 862, the court said: "The judge found that the petitioner's eyesight was affected about one-third; that he had distressing pains in his head, and his nervous system was much below par; that his disability was partial in character and permanent in quality. He, therefore, decided to commute petitioner's compensation to \$1,000. Since the petitioner claims the benefit of the statute, the statute must be our guide. The schedule contained in the statute does not provide specifically for the injuries involved in this case. The compensation, therefore, must bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule. We are not informed what sum per week the trial judge thought justified under this statute, nor how he reached his result. The statute provides that the amounts payable periodically as compensation may be commuted to a lump sum provided the same be in the interest of justice. We can not pass upon the justice of the result reached by the trial judge unless we know the sum payable periodically, the method by which he reached his result, and the reasons that induced him to commute the periodical payments into a lump sum. *Long v. Bergen Common Pleas*, 84 N. J. Law, 117, 86 Atl. 529. The case does not even show that he ever determined, as the statute requires,

the relation borne by the petitioner's disabilities to those produced by the injuries named in the schedule, nor that he even determined the amount of the periodical payments before commuting them. It seems that he treated the case as if it arose under the common law, and awarded, as a jury might have done in an ordinary action, such sum as seemed to him just."

Where the only beneficiary of an employee who was killed in his employment was a woman 58 years of age, and in ill health, it was held in Illinois that it was improper for the board to allow a lump sum settlement as the dependent might not outlive the period of time when the employer was obligated to make payments in installments under the Illinois Act. *Mateency v. Vierling Steel Works*, 187 Ill. App. 448.

Under the Nebraska Act, after compensation has been fixed by agreement, the parties may agree to pay and accept a lump sum in lieu of periodical payments, but the employer cannot be compelled to pay nor the employee to receive a lump sum. Where the employer and employee have made such an agreement it will bind the employer's insurance carrier if the agreement is reasonable. Lump sum payments are only allowable when it is clearly shown that the condition of the beneficiaries justifies the departure from weekly payments. It was also held that the Nebraska statute does not require six months to elapse before an agreement for a lump sum payment to resident claimants can be made, nor is it necessary to procure the consent of the court to such an agreement. *Bailey v. U. S. Fidelity & Guaranty Co.*, 99 Neb. 109, 155 N. W. 237.

Under the same act the right to commute compensation to lump sum payments depends on agreement of the parties and in certain specified cases only the consent of the court must be obtained. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N. W. 509, and the district court can not enter a judgment for a lump sum settlement unless

the parties agree. *Johansen v. Union Stockyards Co. of Omaha*, 99 Neb. 328, 156 N. W. 511.

Under the Minnesota Act the parties must agree on a lump sum settlement and the court cannot commute periodical payments against the will of either party. *State ex rel Anseth v. District Court (Minn.)*, 158 N. W. 713.

For note on lump sum payments under the English Act, see L. R. A. 1916A 172-174.

§ 240. Appeals in General.

An appeal to the courts is usually allowed, either to the employer or his insurer from an order or award of a board or commission with certain limitations as to what may be considered on review. This is also true where the original jurisdiction is in an inferior court instead of a board. The acts are generally specific as to procedure on appeal and it is not within the scope of this work to go exhaustively into the matter.

§ 241. Time Limit on Appeal.

Some of the acts, in keeping with the desire to avoid delays, provide a limit of time within which a petition for review of an order or award must be filed.

This is true under the Kentucky Act of 1916, which provides that the petition for review must be filed in "a circuit court that would have jurisdiction to try an action for damages for said injuries if this act had not been passed;" and it must be filed within twenty days after the board (see sections 50 and 51 of the act) has rendered a final order in the case. Unless this provision is strictly complied with the right of appeal to the circuit court, and consequently to the court of appeals, is lost.

In construing a similar section the circuit court of Dane county, Wisconsin, in *Dane County v. Industrial Comm. of Wis.*, 9 N. C. C. A. 906, said: "An examination of the workmen's Compensation act discloses a clear intent to do away with the delays incident to the common law method of fixing compensation for injured employees, and to substi-

tute in its place a proceeding by which compensation could be fixed speedily, in order that the injured employee might have compensation allowed while he was under disability." After touching on the various sections of the act relative to procedure, the court continued: "These statutes clearly evidence a legislative intent to expedite the entire proceeding to determine compensation. In harmony with that intent it must be held that the legislature meant just what it said when it provided, that the awards of the defendant commission 'shall be subject to review only in the manner . . . following,' i. e., when an action to review such award is begun 'within twenty days from the date of the order or award' (section 2394-19). This action, not having been begun within that period of twenty days, the action must be dismissed."

This time could probably be extended by agreement, but in view of the fact that one of the purposes of the act is to avoid delays, the court probably could not grant an extension over the objection of either party.

§ 242. Review of Court Is Limited.

The review of the court is generally confined to certain definite subjects set forth in the acts. The provision of the act in question is the only absolute guide on this subject.

Many of the acts, for example, have provisions on this question similar to those of the Kentucky Act of 1916, which are set out below.

Under that act the review of the court is limited to the determination whether: "(1) The board acted without or in excess of its powers. (2) The order, decision or award was procured by fraud. (3) The order, decision or award is not in conformity to the provisions of this act. (4) If findings of fact are in issue, whether such findings of fact support the order, decision or award."

After a hearing, the court may remand the cause to the board without carrying the proceedings to judgment, or it can enter judgment, affirming, modifying or setting aside

the award or order of the board, or remanding the cause for further proceedings consistent with the court's directions.

For note on appeal and review generally see L. R. A. 1916A 266-271.

§ 243. Employer Insured in New York State Fund Has No Appeal.

Under the New York Act it seems that an employer only has the right of appeal if he is privately insured. In *Crockett v. State Insurance Fund*, 170 App. Div. 122, 155 N. Y. Supp. 692, compensation was awarded to Elizabeth K. Crockett for the death of her husband while in the employ of the International Railway Co. The company was insured with the State fund, from which the compensation was payable. The employer appealed, but the appeal was dismissed on the ground that when the insurance is placed with the State fund, absolutely relieving the employer from all liability, the law gives the employer no right to appeal. The possibility that an award from the fund would cause an increase in the premium rates was held to create too remote an interest to confer upon the employer the right to appeal. An appeal from this judgment was taken to the court of appeals.

§ 244. Insurer Cannot Appeal on Distribution of Payments Alone.

In *re Janes*, 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552, John C. Janes, the employee, died as a result of injuries which arose out of and in the course of his employment. Janes was a widower. The industrial accident board found that his two minor children were living with him at the time of the injury and were wholly dependent. One child died about a week after the father's death. The decree of the superior court was to the effect that the sum payable as compensation should be divided between the guardian of the surviving child and the administrator of the deceased child. The guardian of the living child did not appeal from this decision, but the insurer did. The court decided that

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the insurer had no right of appeal in the matter of the distribution of the compensation, the amount being the same in any case. This ruling was said not to intimate an opinion as to the soundness in law of the decree sought to be called in question.

§ 245. Injuries Caused by Third Persons.

The exact wording of the act in question should, of course, first be consulted on this as well as all other questions arising under the acts. While some of the acts require an absolute election whether to sue the third person or collect compensation, and, while others grant some of the rights as set out below, withholding some, the general effect of the majority of the provisions in regard to this subject may be stated as follows: Whenever an injury occurs to an employee for which some third person is legally liable, but which was at the same time an accident or injury arising out of and in the course of employment or one covered by the act, the injured employee can either claim compensation from his employer or proceed at law against the person causing the injury, at his option, or he may do both. But he can not both collect compensation and damages. In other words, if he did not recover as great a sum in damages as the act entitles him to, his employer would receive credit for the sum he did recover and he could make claim against the employer for the balance, but if the damages awarded were greater than the compensation, the employee would be entitled to the excess. However, if the injured man both claimed under the act and sued at law the employer would have the right to ask to be made a party to the suit for damages and set up his claim there for the compensation for which he is liable under the act, as against any verdict that might be rendered. If the employee elects to receive compensation without bringing suit, the employer may sue the person causing the injury for indemnity.

The New York law does not require the employee to give notice of election to sue the third party whose negligence

caused the injury, as the common law right of an employee to sue the third person is not affected by the workmen's compensation law. *Lester v. Otis Elevator Co.*, 169 App. Div. 613, 155 N. Y. S. 524.

A workman whose master had complied with the New York law, with which he had also complied, was held entitled to sue a third person causing personal injuries, without any definite election. *Lester v. Otis Elevator Co.*, 153 N. Y. S. 1058, 90 Misc. Rep. 649, affirmed, 155 N. Y. S. 524.

§ 246. Effect Where Both Employer and Third Person Have Elected Act.

In *Smale v. Wrought Washer Co.*, 160 Wis. 331, 151 N. W. 803, *Smale* recovered a verdict of \$12,000 against the *Wrought Washer Co.*, a third person, through whose negligence he was injured. The court said:

"It appeared that both the *Andrae Company* (plaintiff's employer) and the defendant had, prior to this accident, elected to become subject to the provisions of the workmen's compensation act (sections 2394-1 to 2394-31, Stats. Wis.), and the defendant's first claim is that on account of this fact the defendant is not liable to an action at law. The claim cannot be sustained. The purpose and effect of the workmen's compensation act is to control and regulate the relations between an employer and his employees. As between them the remedies there provided are exclusive when both are under the act at the time of the accident. The law does not attempt in any way to abridge the remedies which an employee of one person may have at law against a third person for a tort which such third person commits against him, unless it be a case such as is provided for by section 2394-6, Stats. 1913 (chapter 599, Laws 1913). The present case does not come within that section and hence it is unnecessary to consider its effect."

§ 247. Rights and Remedies of Employer Against Third Person.

Whenever the employer shall have paid compensation,

or have become liable therefore by award of the board or court, he can sue the third person, legally liable for the injury, for indemnity, but if he collects a greater amount than the act makes him liable for to this employee the excess must usually be turned over to the employee. This same right exists in favor of an insurance company underwriting the employer's risk. *Turnquist v. Hannon*, 219 Mass. 560, 107 N. E. 433. But where the negligence of his own employees helped to cause the injury as well as the negligence of a third person it has been held that the employer could not maintain an action for indemnity. *Cory v. France, F. & Co.*, 1 K. B. 114 (Eng.), L. R. A. 1916A (note) 362.

In Wisconsin it has been held that where the employer's right to sue a third person was established, the employer could assign it to another who could bring the action. *McGarvey v. Independent Oil & Grease Co.*, 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A. 803.

Where an insurance carrier pays a claim for injuries caused by third person and becomes the assignee to the cause of action of the workman, it would only be indemnified for the amount actually paid out and cannot recover anything in excess of that. *U. S. Fidelity & Guaranty Co. v. N. Y. Railways Co.*, 156 N. Y. S. 615, 93 Misc. Rep. 118.

Where an injured employee had received compensation from his immediate employer which subrogated the employer or insurer to his right of action against a third person, the allegation and consequent subrogation may be set up by the third person in an action by employee. *Miller v. N. Y. Railways Co.*, 157 N. Y. S. 200, 171 App. Div. 316.

In *Turnquist v. Hannon* (supra) it was said: "This action is brought in her (the adm'x.) name by the insurance company for its benefit under section 15 of part 3 of the act, which is in these words:

'Sec. 15. Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employee may

at his option proceed either at law against that person to recover damages or against the association for compensation under this act, but not against both, and if compensation be paid under this act, the association may enforce in the name of the employee, or in its own name and for its own benefit, the liability of such other person.'

If the injury in the case at bar had not resulted in his death, two alternatives would have been open to the employee under the terms of part 3, section 15, of the act: (1) To bring an action at law against the defendant for the injury done him, or (2) to proceed for compensation under the workmen's compensation act. But he could not have pursued both remedies. He would have been bound to elect between the two. . . .

The act by part 3, section 15, does not import into its terms the equitable principle of subrogation. It simply provides that where the insurer has afforded the prompt relief to the dependents of a deceased employee which the act requires, it may enforce for its own benefit the rights against tortious third persons causing his injury which would otherwise have been available to the employee or his representatives.

This right is not dependent upon reimbursement or subrogation. It puts upon the insurer the burden of undertaking what in many instances might be litigation uncertain by reason of disputed facts or novel law, but gives it all the advantage of the right of action which in substance is assigned to it. Hence, it is an immaterial circumstance how much it may have paid or be liable to pay under the act.

Inasmuch as the liability established by the death statute is in substance a penalty or fine, the Commonwealth, through its legislature, can make such fine payable to any person equitably entitled to it. Where the legislature provides that the one who has afforded prompt relief to the dependents of the deceased may receive the penalty, there is no legal reason why it should not be enforced."

§ 248. Effect of Settlement by Employee With Third Persons.

There is usually no provision as to what the effect shall be when an employee having a claim both against the employer for compensation and a third person for damages, settles the claim with the third person. The employer is made liable, under the acts generally, for the benefit of the employee, for injuries caused by third persons, but the employer has the right to seek reimbursement for the amount paid out from the person who is legally liable for the injury. Therefore, when an employee settles with such third person without the employer's consent he is depriving the employer of the right given him by the act to seek full indemnity for the compensation for which the law makes him liable. It has, therefore, been held that the acceptance of such a settlement with a third person whose negligence caused the injury is a bar to a claim for compensation against the employer. *Cripps' Case*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B 828; *Page v. Burtwell*, 2 K. B. (Eng.) 758, L. R. A. 1916A (note) 361.

In the *Cripps Case* (*supra*) a driver of a truck was injured by the negligence of a street car company. It was held that he lost his right to compensation by settling with the company, although he had not brought suit against them. But in the same case it was held when he later died of these injuries that his widow was not by his settlement deprived of her right to compensation. The settlement is a bar although in making it the workman expressly reserved his right to compensation. *Mulligan v. Dick*, 41 Scot. L. R. 77; *Murray v. North British R. Co.*, 41 Scot. L. R. 383, L. R. A. 1916A (note) 361.

For further discussion of injuries caused by third persons, see L. R. A. 1916A (note), (Eng. Cases) 101, (American Cases) 225. See also L. R. A. 1916A (note) 360, 5 N. C. C. A. (note) 524-528, 10 N. C. C. A. 939-945.

§ 249. Burial Expenses.

Practically every workmen's compensation law allows burial expenses, within certain limits, in addition to medical expenses and compensation. Usually it is only necessary to prove that the employer and employee were under the act and that the death resulted proximately from an accident or injury arising out of and in the course of the employment. *Stephens v. Clark*, 2 Cal. Ind. Acc. Comm., 135, 11 N. C. C. A. (note) 716. Some acts only allow burial expenses where there are no dependents surviving. *Pelham v. Burstein*, 1 Conn. Comp. Dec. 49. This was formerly the case in New Jersey, *Taylor v. Seabrook*, 87 N. J. Law 487, 94 Atl. 399, 11 N. C. C. A. 710, but an amendment of 1914 provides for burial expenses in all cases covered by the act. Under the New York Act attempt was made by a relative of the deceased man to collect a claim for services in connection with the funeral, although the claimant did not claim reimbursement for money spent. It was held in *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, 158 N. Y. Supp. 883, that such a claim was not within the purview of the act. Where funeral expenses within a certain limit are a proper charge it was held in Michigan that the employer could not dictate to the family how the details should be arranged or what should be paid for a lot, carriages, etc., so long as the expense was reasonable and within the limit of expense allowed by the act, *Konkel v. Ford Motor Co.*, Mich. Ind. Acc. Bd. Bul. (No. 3, 1913) 29, 11 N. C. C. A. (note) 716.

Under the Kentucky Act of 1916 the employer must pay burial expenses up to \$75, medical expenses, and where there are no dependents the employer must pay in addition a fixed sum of \$100 to the personal representative of an employee who died from injuries covered by the act without dependents. The provision for paying this sum to the personal representative in any event was probably inserted because of the language in *Ky. State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A, 389, holding the 1914 act invalid, when



the court, in construing section 241 of the Constitution of the State of Kentucky, said: "And it is immaterial, under this section of the Constitution, whether the money recovered goes to the children or parents, or becomes part of his personal estate. The disposition of the money after his death can not affect the right of the personal representative to recover. It may go to his heirs, or it may become a part of his personal estate and go to his creditors."

For note on liability of the employer for burial expenses, see 11 N. C. C. A. 710-717.

§ 250. Deductions From Compensation.

Generally, if allowable at all, no deductions can be made from the compensation provided for by the acts unless the approval of the board or court is first obtained. The payments made or value of supplies furnished, for which a deduction in the amount payable as compensation is asked, must be payment or supplies in addition to those granted by the act. Free board and lodging, free house rent, and free use of land for gardening purposes might be considered as examples of this class of extra payments. It has been held in England that rent of a cottage belonging to the employer and occupied by the workman, may properly be deducted from the amount of compensation awarded under an agreement between the employer and employee. *Brown v. S. E. & C. Ry. Co.'s Managing Committee*, 3 B. W. C. C. 428, *Bradbury's Work. Comp.* 248.

If the employer furnished hospital treatment beyond requirements of the act and it was clearly a benefit to the workman that he did so, payments made for it might possibly be approved by the board as a deduction. This seems to be the principal announced in *Suleman v. The Ben Lomond*, 2 B. W. C. C. 499, *Boyd's Work. Comp.*, § 535. A deduction because the workman had been imprisoned for a crime was denied, but it was ordered that a portion of his compensation should be paid for the support of his children. *Clayton v. Dobbs*, 2 B. W. C. C. 488, *Boyd's Work.*

Comp., § 536. It has been held, that the cost of explosives used by a miner, although procured from the employer, who deducts the cost thereof from the miner's wages does not represent a sum paid to the miner to cover any special expenses. *McKee v. Stein*, 3 B. W. C. C. 544, L. R. A. 1916A (note) 159.

In *Barbour Flax Spinning Co. v. Hagerty*, 85 N. J. Law 407, 89 Atl. 919, 4 N. C. C. A. 586, it was in evidence that the petitioner Hagerty had received the statutory weekly compensation for his injury for a period of fifty-two weeks, for which no credit had been given. As to this the court said:

"The petition avers that it was received from the insurance company of the defendant. The admission at the trial was that it was paid by the defendant. If that is true, or if the premium for the insurance had been paid by the defendant, credit should have been given. If, however, the payment was by virtue of insurance paid for by the petitioner, the defendant is entitled to no credit therefor."

In *De Zeng v. Pressey*, 86 N. J. Law 469, 92 Atl. 278, the court said:

"Next it is argued that, because the petitioner worked for the prosecutor for fifty-five weeks at full wages, these fifty-five weeks should be deducted from the sixty weeks for which the award was made. The answer is that the prosecutor was under no obligation to employ the petitioner at \$20 a week or any other sum, and that inasmuch as he chose to do so without any understanding, express or implied, that petitioner was not worth those wages, or that part of them should be treated as moneys paid under the compensation act, he must be presumed to have paid the money as wages and because he thought the petitioner was worth that amount."

It has been held under the English Act that deductions for previous overpayments of compensation were improper. *Flyn v. Burgess* (Eng.), W. C. & Ins. Rep. 238; *Hosegood &*

Sons v. Wilson (Eng.), 4 B. W. C. C. 30; Doyle v. Cork Steam Packet Co., 5 B. W. C. C. 350.

§ 251. Contracting Out.

Almost all of the acts now in force have a provision making any agreement by the employee which waives his right to compensation void. Such a provision in the New Jersey Act was held not to apply where an accident happened before the act was passed. Blackford v. Green, 87 N. J. Law 359, 94 Atl. 401.

This provision is for the protection of the employee. It prohibits and makes void any agreement of any kind between the employer and employee by which the employer is relieved of any of the obligations of this act, except as provided under the conditions of the act. The employer must pay the full compensation to which this law entitles the injured workman. If the employer by agreement with the employee settles for less than he is entitled to, credit for this sum should be given in a subsequent award for the full amount due. Neither can the employer make any rule for the conduct of his business, the effect of which would be to lessen his liability.

The employer can not lessen his obligations and the employee can not waive his rights under the statute by agreement. Such agreements have been held void as against public policy in addition to being prohibited by the act. See Powley v. Vivian & Co., 169 App. Div. 170, 154 N. Y. Supp. 426.

In opinion of the justices, 209 Mass. 607, 1 N. C. C. A. 557, the court said: "It is within the power of the legislature to provide that no agreement by an employee to waive his right to compensation under the act shall be valid."

§ 252. Right of Compensation as Prior Lien.

Under most acts claims for compensation have the same preference or priority for full and complete payment against the assets of the employer as is allowed by statute for un-

paid wages. In Kentucky, for example, the lien for wages mentioned is created by Carroll's Ky. Statutes, § 2487 (act of 1914) against "the property or effects of any mine, railroad, turnpike, or canal, or other public improvement company, or of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, whether incorporated or not." Section 2488 of Carroll's Ky. Statutes makes this lien superior to "any mortgage or other incumbrance thereafter created and shall be for the whole amount due such employees as such . . . that for wages coming due to employees within six months before the property or effects shall in any wise come to be distributed among creditors, as provided in section 2487, the lien of such employees shall be superior to the lien of any mortgage or other incumbrance theretofore or thereafter created." The lien for compensation would be equal to the lien for taxes given to the State, county, city, town or taxing district under Carroll's Ky. Statutes, §4021 (3).

§ 253. Claims for Compensation Cannot Be Assigned or Attached.

One of the purposes of the compensation act is to lend support to the family of a disabled or deceased workman and therefore provision is generally made to protect both the workman and his family by making assignments of claims for compensation illegal and by exempting payments of, or claims for, compensation from all claims of creditors. Thus they can not be garnisheed or attached either in the hands of the employer or his insurers, but must be paid in full direct to the employee or his dependents or to the person entitled to receive them.

§ 254. Attorney's Fees.

Attorney's fees, under the Michigan Act, are subject to the approval of the Industrial Board. It was held that the Michigan Act was not unconstitutional for that reason. *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

It was held in Missouri that attorneys of that State had no lien against a Kansas employer having elected the Kansas Workmen's Compensation Act when this Kansas employer settled with the employee under that act after they had notice of the employment of the Missouri attorneys. *Piatt v. Swift & Co.*, 188 Mo. App. 584, 176 S. W. 434.

Under the Minnesota Act no provision is made for liens of attorneys' fees, but it was held that the court could allow statutory costs, although designated in the order as attorneys' fees. *State v. District Court of St. Louis Co.*, 129 Minn. 423, 152 N. W. 838.

In *Boyd v. Pratt et al.* (Wash), 130 Pac. 371, the allowance of an attorney's fee was treated: The act in question gives the trial court authority to fix a reasonable attorney's fee, and also allows for an appeal "from the judgment of the superior court as in other civil cases." The superior court had fixed a fee which the claimant's attorney urged should be made more liberal in view of the expense and delay attending upon the appeal taken. This the court refused to allow, saying:

"The only warrant in the law for fixing an attorney's fee at all is to be found in the statute just quoted. The power to fix fees is there limited to the superior court. The only rights that can be claimed on appeal to this court are such as are given by the general appeal statutes, the provision fixing our right of review being: 'Appeal shall lie from the judgment of the superior court as in other civil cases.' We find nothing in our appellate procedure which would warrant us in allowing an attorney's fee in this or similar cases. The motion for an additional fee is denied."

Under the Kentucky Act of 1916, § 59, an attorney can not charge in excess of 15 per cent. on the first \$1,000 received and 10 per cent. on each additional \$1,000, and upon proof of solicitation of employment the board may reduce the fee or deny it altogether.

§ 255. Reports of Accidents by Employer.

The acts generally require the employer to keep a record of all injuries and make a report to the board or some administrative officer detailing the facts of the accident. This is usually required as a check on the employers and also for statistical purposes.

The employer's notice of an accident is competent prima facie evidence of the facts therein stated, but it may be contradicted. *First Nat'l Bank of Milwaukee v. Ind. Comm.* 161 Wis. 526, 154 N. W. 847; *Reck v. Whittlesburger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C 771.

§ 256. Deliberate Intention to Produce Injury.

The Kentucky and Oregon acts and some others use this phrase in connection with those acts of the employer for which he is penalized in some way.

In *Jenkins v. Carman Mfg. Co. (Ore.)*, 155 Pac. 703, 11 N. C. C. A. 547, the court said:

"As to the right of recovery under the twenty-second section the allegations are somewhat argumentative and inconsistent, but, taken as a whole and fairly construed, they amount to this: That defendant knew the roll was broken and a menace and danger to workmen, and knowing this fact carelessly, recklessly and negligently failed to repair it, and required its workmen to labor in its vicinity in its defective condition, deliberately intending to risk the danger of an injury. The deliberate intent follows as a deduction from the allegation of knowledge of the danger and the carelessness, negligence and recklessness of defendant in not obviating it. In our opinion the allegation goes no further than to charge that defendant, with full knowledge of the defect, carelessly, negligently and recklessly took the risk of its injuring the plaintiff. If defendant deliberately intended to wound plaintiff or his fellow-workmen and intentionally used this broken roll as he (it) would have used an axe or a club to produce the intended injury, it is liable; otherwise it is not. A deliberate act is

one, the consequences of which are weighed in the mind beforehand. It is prolonged premeditation, and the word when used in connection with an injury to another denotes design and malignity of heart. It has been defined so many times that it is difficult to select any one definition which covers every phase in which the word is used, but some of the most apt are:

'The word 'deliberate' is derived from two Latin words, which mean, literally, 'concerning,' and 'to weigh.' . . . As an adjective . . . it means that the manner of the performance was determined upon after examination and reflection—that the consequences, chances and means weighed, carefully considered and estimated.' *Craft v. State*, 3 Kan. 451.

'Deliberation is prolonged premeditation.' *State v. Speyer*, 207 Mo. 540, 106 S. W. 505, 14 L. R. A. (N. S.), 836.

'Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done.' *United States v. Kie*, 26 Fed. Cas. 781.

We think by the words 'deliberate intention to produce the injury' that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent and not merely carelessness or negligence, however gross.

The judgment is affirmed."

§ 257. Willful Act of Employer.

Some of the acts penalize the employer when the injury resulted from the willful act of the employer. The Ohio Act has such a provision, which was construed in the case of *McWeeny v. Standard Boiler Plate Co.*, 210 Fed. 507, 4 N. C. C. A. 919, affirmed 218 Fed. 361, 134 C. C. A. 169. The facts were as follows: John J. McWeeny was very seriously injured while in the employ of the defendant company. He sued the company, in spite of the fact that the company had complied with the provisions of the workmen's

compensation act of Ohio, relying on the provision of section 21-2 of that act that nothing in the act shall affect the civil liability of the employer when the injury has arisen from the willful act of the employer or any of his agents or servants, or from the failure of any of them to comply with any statute for the protection of the life or safety of employees. He recovered a verdict of \$14,000, and the company moved for a new trial, which was denied. The nature of the willful act claimed by the plaintiff, and the view taken by the trial court as to what constitutes such an act, is shown in the following extracts from the opinion of the court:

"The plaintiff and other employees of the defendant company, together with a man named Fisher, the foreman, having charge of the work, were engaged in erecting a large sheet-iron tank to be used for the storage of chemicals. This tank was composed of large iron plates which were lifted in position by means of a derrick and boom erected upon a scaffolding placed within this large metal tank. Shortly before the accident occurred, the attention of Fisher, the foreman, was several times directed to the fact that the mast of the derrick was leaning two feet, that one of the guy lines was weak, and several of the men said to him that the mast should be straightened and the guy lines should be tightened and replaced. Fisher refused to do this, and, notwithstanding the fact that his attention was called to the defects in this derrick several times and that a strain of a ton load was being placed upon the guy lines and the derrick, the foreman, with an oath, directed McWeeny and the other men to proceed with the lifting of the heavy iron plate. They did so, and while engaged in this work the scaffolding and derrick collapsed, injuring McWeeny and several other of the men.

The evidence tends to show that the foreman at the time of this unfortunate occurrence was himself in a place which was of no danger to him. . . .

From an examination of these sections [20-1 and 21-2] it is apparent that, where an employer has complied with the provisions of this act in paying the premiums into the funds and in posting the necessary notices, the employee in case of injury, or his representative in case of death, can not recover for negligence or the want of ordinary care, but if the injury results from a willful act, or from the violation of a statute or ordinance or order of any duly authorized officer, which statute, ordinance, or order was enacted for the protection of the life or safety of the employee, then in such event the employee can either take the benefits provided under this act or sue in court to recover.

The defendant contends that the willful act in contemplation of this statute must have been an act done intentionally with a purpose to inflict injury. The court charged at the trial, in part:

'To constitute a willful act in this case, you must find that the action of Fisher was such an action as to evince an utter disregard of consequences so as to inflict the injuries complained of. In other words, the negligent action was such recklessness reaching in degree to utter disregard of consequences which might probably follow. If the action of Fisher in ordering McWeeny to work on this scaffold and in connection with this derrick was done under such circumstances as to evince an utter disregard for the safety of McWeeny and the other employees working there in connection with him, then that action was a willful act.' . . .

If the contention urged by defendant that a willful act had to be an act coupled with an intention to injure the employee were the correct construction of those terms of the statute, then the employers of laborers, so long as they themselves or their employees did not criminally injure their employees, could incur no liability no matter how recklessly or carelessly they conducted their business without any regard to the safety of those employed. . . .

Extreme cases of this sort will seldom arise. I can not believe that the legislature intended that the term 'willful

act' should be narrowed down to mean a deliberate intent to do bodily injury and nothing else. This compensation act was passed for a purpose; its primary purpose was to protect the men engaged in the various occupations in Ohio.

In my opinion, the case was fairly tried, and the issues fairly submitted, and the motion for a new trial will be overruled."

Failure to grind a circular saw as required by laws of 1909, page 202, held "an intentional omission" within Ill. acct. of 1911. *Forrest v. Roper Furniture Co.*, 267 Ill. 331, 108 N. E. 328. See further 11 N. C. C. A. 547-560.

§ 258. Willful and Known Violation of Statute—Kentucky.

The word "willful" when used alone in connection with statutes has been construed to mean simply a voluntary act of a party as distinguished from coercion. *Tray v. Com.*, 76 S. W. 185, 25 Ky. L. R. 669; *Louisville & J. Ferry Co. v. Com.*, 104 Ky. 727, 47 S. W. 878, 20 Ky. L. R. 927; *N. C. & St. L. Ry. Co. v. Com.*, 160 Ky. 50, 169 S. W. 511; *Thomas' Kentucky Words and Phrases*, p. 498.

But "willful and known" means not only a voluntary act, but with it, as a necessary attribute, must go actual or constructive knowledge of the true facts. For instance, suppose a girl really under 16 years of age, who appeared to be 16 years or older, applied for employment as a stemmer in a tobacco factory and stated her age as over 16 years. This being a prohibited employment for children under 16 years (see Ky. Stat., 331a [9]), the employer made a reasonable investigation and required affidavits as to the applicant's age which stated she was over 16. If this girl was employed and subsequently injured, although the employment was actually illegal, there was no "willful and known violation of statute," and therefore no alternative liability under section 30 of the Kentucky Act of 1916.

§ 259. Failure to Comply With a Specific Statute—Kentucky.

Section 29 of the Kentucky Act of 1916, which is quite

similar to some other acts in this regard, reads in part as follows: "Where an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful regulation made thereunder, communicated to such employer and relative to the installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this act, shall be increased 15 per cent. in the amount of each payment."

If the legislature had intended that the mere failure of the employer to comply with a specific statute, or regulation under statute, concerning safety appliances or methods, should increase his liability 15 per cent., they would probably not have used the word "intentional." "Intentional," except in criminal law, is synonymous with "willful." *Jones v. M. & O. R. Co.*, 127 S. W. 145; *Thomas' Kentucky Words and Phrases*, p. 264. This construction is strengthened by the use of the phrase "communicated to such employer," although there is also room for the construction that this phrase refers not to the word "statute," but to the words "lawful regulation made thereunder." At any rate there must be something more than mere failure to comply with a statute. While ordinarily, "intention" is construed into an act amounting to a breach of statute, whether the breaker of it was ignorant of its existence or not, it seems probable that in this instance the legislature intended that the employer should not become liable for this increased compensation of 15 per cent. unless he failed to comply with the statute or regulation after it had been "communicated" to him. It would make no difference from what source the employer received this knowledge. For statutes concerning safety appliances and methods, see *Carroll's Ky. Stat.* (1915), §§ 2722-2738r. (Mines and Mining), and § 331a, sub. sec. 10 (Minors).

§ 260. Compensation Not Barred by Failure of Action at Law.

There are instances under many of the acts when the employee has the option of claiming compensation or suing at law. Under the California Act the employee has such an option if the injury was caused by the employer's gross negligence or willful misconduct of a certain specified character. It was held under such conditions that the failure of the action at law did not bar a subsequent claim for compensation. In the case of *San Francisco Stevedoring Co. v. Pillsbury*, 170 Cal. 321, 149 Pac. 586, 9 N. C. C. A. 37, the court said:

"The Industrial Compensation Act provides substantially that, where the specified conditions of compensation exist the right to recover such compensation in a proceeding before the commission shall be the exclusive remedy of the employee, 'except that when the injury was caused by the employer's gross negligence or willful misconduct and such act or failure to act causing such injury was the personal act or failure to act on the part of the employer himself, . . . and such act or failure to act indicated a willful disregard of the life, limb or bodily safety of the employees, and such injured employee may, at his option, either claim compensation under this act or maintain an action at law for damages.' It will thus be seen that the right of the employee to resort at his option to an action at law for damages is restricted to the class of cases specified in the provision just quoted, viz., cases where the injury was caused by the employer's gross negligence or willful misconduct of a certain specified character. The judgment of the superior court in *Broderick's* (the employee's) action simply determines that the allegations of his complaint failed to state a case of this character, and, therefore, that the proper tribunal for the adjudication of his claim is the Industrial Accident Commission. Nothing else can be held to have been determined against him. He cannot be held to be estopped thereby from pursuing his remedy before



the commission, nor can the commission be held to have been without jurisdiction of the proceeding instituted by him."

§ 261. Extraterritorial Effect of Acts.

In Kentucky this question was simplified by the following provision, being section 8 of the Act of 1916: "Employers who hire employees within this State to work in whole or in part without this State, may agree in writing with such employees to exempt from the operation of this act injuries received outside of this State, in the absence of such an agreement, the remedies provided by this act shall be exclusive as regards injuries received outside this State upon the same terms and conditions as if received within this State."

In many States where a provision similar to this one was not incorporated in the act, the courts have found great difficulty in determining whether their acts applied to injuries received in another State, although the contract of employment was local. Some of the courts have decided that injuries received outside of the State were compensable where there was a local contract of employment, but they have been forced to search their compensation law to construe into it an implied intention of the legislature to cover such cases. *Kennerson v. Thomas Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436; *Spratt v. Sweeney & G. Co.*, 168 App. Div. 403, 153 N. Y. Supp. 505; *Deeny v. Wright & C. Lighterage Co.*, 36 N. J. L. J. 121; *Rounseville v. Cent. R. Co.*, — N. J. L. —, 94 Atl. 392. The contrary was held in *Gould's case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D 372, 4 N. C. C. A. 60. This view was also taken by the Michigan Industrial Board in *Keyes-Davis Co. v. Alderdyce*, Detroit Legal News, May 3, 1913, 3 N. C. C. A. 639, note, and this seems also to be the rule in England *Tomalin v. S. Pearson & Son*, 2 K. B. 61, 25 Times L. R. 477, 2 B. W. C. C. 1.

For detailed discussion of this question see L. R. A.

1916A (note), 443-445. Also 7 N. C. C. A. (note), 144-148. For discussion of actions in a foreign State for injuries in a compensation State, see 7 N. C. C. A. (note), 148-152. On the question of a common law action in a compensation State for injuries in a foreign State, see *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A 432, 5 N. C. C. A. 814. For a decision denying the right to bring a common law action in Rhode Island for injuries received in Massachusetts, where the contract of employment was made and where no right of action at common law existed because of the employee's failure to comply with the Massachusetts' Workmen's Compensation Statute, see *Pendar v. H. & B. Amer. Machine Co.*, 35 R. I. 321, 87 Atl. 1, L. R. A. 1916A 428.

A miner employed in West Virginia worked a part of the time in that part of the mines situated in West Virginia, and part of the time in the portion situated in an adjoining state. He was killed while at work in the adjoining state. It was held that his widow was entitled to compensation, and that the relation of employer and employee under the act is contractual and that the Statute is a part of the contract of employment and is enforceable in other jurisdictions unless opposed to the public policy thereof. *Gooding v. Ott*, 87 S. E. 863 (West Va.)

It was held in New York that where an employer insured under the compensation act of that state, an employee was entitled to benefits under the New York act when injured in the course of his employment outside of the state. *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403, 153 N. Y. Supp. 505, order affirmed *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351. See also, *Edwardsen v. Jarvis Lighterage Co.*, 160 App. Div. 368, 153 N. Y. Supp. 391, and *Lehmann v. Ramo Films*, 155 N. Y. Supp. 1032, 92 Misc. Rep. 418.

It was said in *Deeny v. Wright & Cobb Lighterage Co.*, 36 N. J. L. J. 121, 7 N. C. C. A., note 144: "The statute can have no extraterritorial effect, but it can require a contract

to be made, by two parties to a hiring, that the contract shall have an extraterritorial effect. The contract is binding on the employee himself and upon the employer, and it is conclusively presumed that the parties have accepted the provisions of section 2 and have agreed to be bound thereby. . . . It would seem that the reasonable construction of the statute is, that it writes into the contract of employment certain additional terms. The cause of action of the petitioner is *ex contractu*. The *lex loci contractus* governs the construction of the contract and determines the legal obligations arising from it."

For note on extraterritorial effect of Workmen's Compensation Acts see 9 N. C. C. A. 918-932, 10 N. C. C. A. 888.

§ 262. Act Effective Outside New York.

The case of *Post v. Burger & Gohlke*, 216 N. Y. 544, 111 N. E. 351, 10 N. C. C. A. 888, Ann. Cas. 1916B 158, decides that the New York act is effective outside of New York. The facts were as follows:

Burger & Gohlke formed a corporation engaged in sheet-metal work, their office being in Brooklyn, N. Y. Post, a resident of that place, had been in their employ for more than two years, and was sent by them on September 1, 1914, to perform work on a building in Jersey City, N. J., and while there engaged he received an injury to his wrist for which compensation was awarded. To secure compensation due to its employees from time to time the company named was insured, and from the award of the State Commission, affirmed by the appellate division of the supreme court, the employer and its insurer brought this appeal to the court of appeals. The sole question involved was that of the effect of the law as covering work done outside the limits of the State, and the construction adopted by the courts was to the effect that the law does so apply, on the ground that the act reads into the contract between every employee and his employer the provisions of the compensation system without regard to the place of the occur-

rence of the accident. Having stated the facts, and announced certain fundamental principles, Judge Chase said:

“It is well settled that the legislature has the power to compel a contract between employer and employee that is extraterritorial in effect.

In determining the intention of the legislature in enacting the workmen's compensation law of this State there are two important provisions of the act that must constantly be borne in mind, as they affect and characterize all the other provisions of the act:

1. In the absence of substantial evidence to the contrary, it must be presumed that the claim comes within the provisions of the act. (Workmen's compensation law, sec. 21.)

2. The liability of the employer for compensation includes every accidental personal injury sustained by the employee, arising out of and in the course of his employment, without regard to fault as a cause of such injury.’”

He then discussed the various provisions of the act, defining the parties affected, the duty of the employer as to medical attendance, security of compensation, and mode of determination of rights under the act. Reference was then made to the inadequacy of the common-law doctrine of employer's liability under present industrial conditions, after which Judge Chase continued:

“The act was passed pursuant to a widespread belief in its value as a means of protecting workingmen and their dependents from want in case of injury when engaged in certain specified employments. It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity and to make reasonable compensation for injuries sustained or death incurred by reason of such employment, a part of the expense of the lines of business included within the definition of hazardous employments as stated in the act. It was also the intention of the legislature to make such compensation not only a part of the expense of the business

and a part of the cost of the things manufactured and of transportation as defined by the act, but ultimately to require such compensation to be paid by the consumer of the manufactured goods and by those securing transportation. The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory; that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract. (6 Ruling Case Law 588; Board of Highway Commissioners v. Bloomington, 253 Ills. 164.)

Our conclusion as to the intention of the legislature is reached from the act as a whole. The intention is also specifically shown by the fact, as already stated, that an employee as defined by this act includes a person engaged in the course of his employment away from the plant of the employer. The language of the statute, if construed literally, and we see no reason why it should not be, expressly includes the employee in this case, as he was engaged in his employment in New Jersey, away from the plant of his employer, and under the employer's express direction.

It is also specifically shown by the fact that the cost of insurance is determined by ascertaining the number of all the employees of the employer and the wages paid to them. There is no provision in the act for ascertaining the number of employees of an employer engaged in employment within the State of New York, nor is there any deduction from the amount to be paid for State or other insurance by reason of the fact, if true, that a portion of the employees of an employer are or may be engaged outside of the boundaries of the State. The provision in regard to insurance and the manner of ascertaining the premium for the same and the fact that no provision is made for basing the insurance premium on employment within the State or in

any way limiting the liability of the insurance carrier to injuries received in the State, shows that the act was passed without intending to limit the same to a contract for employment within the State. The purpose of the legislature would seem to require that the act be read into every contract of employment and provide compensation for every injury incurred while engaged in such employment without limitation."

The appellants had referred to a case arising under the compensation act of Massachusetts, in which it was held that the law of that State did not have effect beyond its boundaries; as to this, however, it was pointed out that the statute of Massachusetts contained expressions not found in that of New York, so that the case did not afford a precedent. Reference was also made to a case in the Connecticut courts, *Kennerson v. Thames Towboat Co.*, 94 Atl. 372, and to *Rounsaville v. Central Railroad Co.*, 94 Atl. 392, a New Jersey case, in which cases the laws of the respective States were held to have extraterritorial effect. Concluding, Judge Chase said:

"The courts of this State have recognized the compensation laws of other States and countries and give effect to such laws, unless they are contrary to the laws or policy of this State. [Cases cited.]

We appreciate that any determination that may be made of the question under consideration will result in some practical difficulties in administering the statute, but the difficulties that will be met with in administering the statute construed as requiring a contract binding upon both parties without limitation will be less burdensome than the difficulties that would be experienced with a contrary construction of the statute. The practical difficulties that may be met in administering the statute as herein construed can be substantially overcome by adopting rules for the commission or perhaps by further legislation."

§ 263. Act Not Effective Outside of Massachusetts.

That the Massachusetts Act was not effective outside of that state was decided In re American Mutual Liability Insurance Co., 215 Mass. 480, 102 N. E. 693, 4 N. C. C. A. 60, Ann. Cas 1914D 372. The court said:

"The facts are that the employee, a citizen and resident of this Commonwealth, made a contract here with the employer, a Massachusetts corporation, for rendering to it his personal services, and accepted the benefits of the act. In the course of his employment he received the injury for which this claim arises, in the State of New York. He was principally employed in Massachusetts, but at times incidentally worked in New York and other States. The industrial accident board found that the insurer had been paid by the employer for insuring all injuries received by its employees in the course of their employment, whether within or without the Commonwealth. This factor is not of much significance because the obligation of the policy does not refer to anything occurring outside the State, and provides only for performance of the requirements and payment of the compensation designated in the act. If the act enjoins the payment of compensation for injuries received outside the State the insurer has contracted therefor, otherwise it has not.

The question is whether the act governs the rights of parties touching injuries received outside the State. It may be assumed for the purposes of this judgment that it is within the power of the legislature to give to the act the effect claimed for it by the employee. (*Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386.

The point to be decided is whether the language used in the act indicates a purpose to make its terms applicable to injuries received outside the State.

A consideration of the act in detail fails to disclose any plain intent to that end. On the contrary, several provisions indicate solely intrastate operation.

The subject of personal injuries received by a work-

man in the course of his employment is within the control of the sovereign power where the injury occurs. 'It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford a cause of action.' *Davis v. N. Y. & N. E. R. R.*, 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138. See *Cormo v. Boston Bridge Works*, 205 Mass. 366, 91 N. E. 313. Most of the compensation acts of the States of the Union contain no provision respecting injuries received in a foreign jurisdiction, although several exempt persons engaged in interstate commerce where Federal laws shall be construed to furnish exclusive remedies, while some expressly limit the operation to employment within the State.

These various acts, although having certain features in common, nevertheless differ widely in many essential aspects. Some are compulsory. Some prohibit contracts for a different form of compensation, and make criminal under severe penalties failure to comply with their terms. Some provide for strict State insurance, while others do not. The amount of compensation afforded and the circumstances under which it is to be awarded differ. The diversity of public policy already manifested between the several States is considerable. To say that such acts are intended to operate on injuries received, outside the several States enacting them would give rise to many difficult questions of conflict of laws.

If employees and employers from different States carry their domiciliary personal injury law with them into other jurisdictions, confusion would ensue in the administration of the law, and at least the appearance of inequality among those working under similar conditions. If such a result had been intended by the general court, it can not be doubted that it would have been disclosed in unambiguous words. The trend of the development of the law, historically considered, has been away from a personal law, and toward a territorial law, before which all are equal.

All these considerations combined forbid the inference

that the legislature, having failed to use plain and unmistakable words to that end, intended our act to govern the rights of the parties as to an injury received in another jurisdiction."

§ 264. Theory-Construction of Acts.

It is almost the universal rule that the provisions of Workmen's Compensation Acts being remedial in character should be broadly construed to effectuate the provisions of the Statute. Appeal of Hotel Bond Co. 93 Atl. 245, 89 Conn. 143.

Liability under the acts is based on contract. Appeal of Hotel Bond Co. 89 Conn. 143, 93 Atl. 245. When the employer and employee have elected to come within the Act the remedy is exclusive. McRoberts v. Nat. Zinc Co., 93 Kan. 364, 144 Pac. 247.

The provisions of the Minnesota Act must be liberally construed. State v. District Court of St. Louis Co., 128 Minn. 43, 150 N. W. 211.

The proceeding for compensation under the New Jersey Act was held to be neither an action in contract nor in tort but really a proceeding to enforce a statutory duty. Baur v. Court of Common Pleas in and for Essex Co., 88 N. J. Law, 128, 95 Atl. 627.

§ 265. Constitutionality of Acts.

The Constitutionality of the various Acts was raised in the following cases:

CALIFORNIA—Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466. Englebreton v. Ind. Acc. Comm., 170 Cal. 793, 151 Pac. 421, 10 N. C. C. A. 545. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1.

CONNECTICUT—Hotel Bond Co.'s Appeal, 89 Conn. 143, 93 Atl. 245.

ILLINOIS—Deibeikis v. Link Belt Co., 261 Ill. 454, 101 N. E. 211, Ann. Cas. 1915A 241, 5 N. C. C. A. 401. Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 105 N. E. 289, 5 N. C. C. A. 419. Crooks v. Tazewell Coal Co., 263 Ill. 343,

105 N. E. 13, 5 N. C. C. A. 410, Ann. Cas. 1915C 304. *Przykopski v. Citizens Coal Mining Co.*, 270 Ill. 275, 110 N. E. 336. *Courter v. Simpson Construction Co.*, 264 Ill. 488, 106 N. E. 350, 6 N. C. C. A. 548. *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 109 N. E. 99. *Devine v. Delano*, 272 Ill. 166, 111 N. E. 742. *Fergus v. Russell*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B 1120. *Richardson v. Sears-Roebuck & Co.*, 271 Ill. 325, 111 N. E. 85. *Lauruska v. Empire Mfg. Co.*, 271 Ill. 304, 111 N. E. 82.

IOWA—*Hunter v. Colfax Consol. Coal Co.*, (Iowa) 154 N. W. 1037, 11 N. C. C. A. 86. *Hawkins v. Bleakley*, 220 Fed. 378.

KANSAS—*Shade v. Ash Grove Lumber & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249.

KENTUCKY—*Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 649, 12 N. C. C. A. 520. *Compare Ky. State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916A 389, which declared the 1914 Act invalid.

MARYLAND—*American Coal Co v. Allegheney County Commissioners*, 128 Md. 564, 98 Atl. 143.

MASSACHUSETTS—*Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557. *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1. *Turnquist v. Hannon*, 219 Mass. 560, 107 N. E. 443.

MICHIGAN—*Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49. *Wood v. City of Detroit*, 155 N. W. 592, L. R. A. 1916C 388. *Grand Rapids Lumber Co. v. Blair*, (Mich) 157 N. W. 29.

MINNESOTA—*Mathison v. Minneapolis Street Ry. Co.*, 126 Minn. 286, 148 N. W. 71, 5 N. C. C. A. 871. *State ex rel Nelson-Spelliscy Co. v. District Court*, 128 Minn. 221, 150 N. W. 623. *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620. *State v. District Court of Meeker Co.*, 128 Minn. 221, 150 N. W. 623.

MONTANA—*Cunningham v. N. W. Improvement*

Ass'n., 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720. *Lewis & Clark Co. v. Ind. Acc. Comm.* (Mont.) 155 Pac. 268.

NEW HAMPSHIRE—*Wheeler v. Contoocook Mills Corp.*, 77 N. H. 551, 94 Atl. 265.

NEW JERSEY—*Sexton v. Newark District Teleg. Co.*, 84 N. J. Law 85, 86 Atl. 451, 3 N. C. C. A. 569, affirmed 86 N. J. Law 701, 91 Atl. 1070. *Huyett v. Pa. R. Co.*, 86 N. J. Law 683, 92 Atl. 58. *Allen v. Millville*, 87 N. J. Law 356, 95 Atl. 130, 1011, 9 N. C. C. A. 749. *Troth v. Millville Bottle Works*, 86 N. J. L. 558, 91 Atl. 1031, affirmed in 98 Atl. 435.

NEW YORK—*Jenson v. Southern Pac. Co.*, 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A 403, Ann. Cas. 1916B 276, 9 N. C. C. A. 286. *Moore v. Lehigh Valley R. Co.*, 169 App. Div. 177, 154 N. Y. Supp. 620. *Wagner v. American Bridge Co.*, 158 N. Y. Supp. 1043. *Herkey v. Agar Mfg. Co.*, 90 Misc. 457, 153 N. Y. Supp. 369. *In re Walker*, 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B 87. *McQueeney v. Sutphen*, 167 App. Div. 528, 153 N. Y. Supp. 554. *Compare Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B 156, 1 N. C. C. A. 517.

OHIO—*State ex rel Yapple v. Creamer*, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694, 97 N. E. 602, 1 N. C. C. A. 30. *Jeffrèy Mfg. Co. v. Blagg*, 90 Ohio St. 376, 108 N. E. 465, affirmed 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570. *Porter v. Hopkins*, 109 N. E. 629.

OKLAHOMA—*Adams v. Iten Biscuit Co.*, (Okla.) 162 Pac. 398.

OREGON—*Evanhoff v. State Ind. Acc. Comm.*, 78 Ore. 503, 154 Pac. 106.

RHODE ISLAND—*Sayles v. Foley*, 96 Atl. 340, 12 N. C. C. A. 949.

TEXAS—*Middleton v. Texas Power & Light Co.*, (Tex.) 185 S. W. 556, 11 N. C. C. A. 873. *Memphis Cotton Oil Co. v. Tolbert*, (Tex. Civ. App.) 171 S. W. 309, 7 N. C. C. A. 547.

WASHINGTON—State ex rel Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L. R. A. (N. S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599. Stoll v. Pac. Coast Steamship Co., 205 Fed. 169, 3 N. C. C. A. 606. State ex rel Pratt v. Seattle, 73 Wash. 396, 132 Pac. 45. State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, 4 N. C. C. A. 811. Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A 358, 4 N. C. C. A. 786, Ann. Cas. 1915D 154.

WEST VIRGINIA—De Francesco v. Piney Mine Co., (W. Va.) 86 S. E. 777, 10 N. C. C. A. 1015.

WISCONSIN—Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 39 L. R. A. (N. S.) 489, 3 N. C. C. A. 649. Mel-lin Lumber Co. v. Ind. Comm., 154 Wis. 114, L. R. A. 1916A 374, 142 N. W. 187, Ann. Cas. 1915B 997.

After the first part of this book was in print the Supreme Court of the United States handed down some very important decisions relating to the constitutionality of the New York, Iowa and Washington Acts and to the conflict between these acts and the Federal Employers' Liability Law. These decisions are of very great importance and they are printed in full in the following pages.

NEW YORK CENTRAL RAILROAD CO.

V.

SARAH WHITE.

— U. S. —, 37 Sup. Ct. Rep. 247.

In error to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, to review a judgment affirmed by the Court of Appeals of that State, which affirmed an award by the State Workmen's Compensation Commission. Affirmed.

See same case below, in appellate division, 169 App. Div. 903, 152 N. Y. Supp. 1149; in court of appeals, 216 N. Y. 653, 110 N. E. 1051.

The facts are stated in the opinion.

Messrs. William L. Visscher, Frank V. Whiting, Robert E. Whalen, and H. Leroy Austin for plaintiff in error.

Messrs. Harold J. Hinman and E. Clarence Aiken, and Mr. Egburt E. Woodbury, Attorney General of New York, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the Workmen's Compensation Law of that State, to recover compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the appellate division of the supreme court for the third judicial department, whose order was affirmed by the court of appeals, without opinion. 169 App. Div. 903, 152 N. Y. Supp. 1149, 216 N. Y. 653, 110 N. E. 1051. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the appellate division, to which the record and proceedings had been remitted by the court of appeals. *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 200, 59 L. ed. 193, 196, 35 Sup. Ct. Rep. 57.

The errors specified are based upon these contentions: (1) that the liability, if any, of the railroad company for the death of Jacob White, is defined and limited exclusively by the provisions of the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the 14th Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. The test is, "Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 558, 60 L. ed. 436, 438, L. R. A. 1916C 797, 36 Sup. Ct. Rep. 188. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 152, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas 1914C 153, 3 N. C. C. A. 779. And see *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 180, 60 L. ed. 941, 942, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; *Raymond v. Chicago, M. & St. P. R. Co.*, this day decided [243 U. S. —, post, —, 37 Sup. Ct. Rep. —]. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes forty-two groups of hazardous employments, defines "employee" as a person engaged in one of these employments upon the premises, or at the plant, or in the course of his employment away from the plant of his employer, but excluding farm

laborers and domestic servants; defines "employment" as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By § 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in § 50, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under the act, or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but, in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death the compensation is known as a death benefit, and

includes funeral expenses, not exceeding \$100, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. Provision is made for the establishment of a Workmen's Compensation Commission with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the Commission is made subject to an appeal, on questions of law only, to the appellate division of the supreme court for the third department, with an ultimate appeal to the court of appeals in cases where such an appeal would lie in civil actions. A fund is created, known as "the state insurance fund," for the purpose of insuring employers against liability under the law, and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the Commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total pay roll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By § 50, each employer is required to secure compensation to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation in the state fund; or (2) through any

stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) "by furnishing satisfactory proof to the Commission of his financial ability to pay such compensation for himself, in which case the Commission may, in its discretion, require the deposit with the Commission of securities of the kind prescribed in § 13 of the Insurance Law, in an amount to be determined by the Commission to secure his liability to pay the compensation provided in this chapter." If an employer fails to comply with this section, he is made liable to a penalty in an amount equal to the pro rata premium that would have been payable for insurance in the state fund during the period of noncompliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by § 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. Laws 1910, chap. 674. This was held by the court of appeals in *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 34 L. R. A. (N. S.) 162, 94 N. E. 431, Ann. Cas. 1912B 156, 1 N. C. C. A. 517, to be invalid because in conflict with the due process of law provisions of the state Constitution and of the 14th Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

"Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state of other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occa-

sioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, chap. 816), and in 1914 re-enacted it (Laws 1914, chap. 41) to take effect as to payment of compensation on July 1 in that year. The act was sustained by the court of appeals as not inconsistent with the 14th Amendment in *Jensen v. Southern P. Co.*, 215 N. Y. 514, L. R. A. 1916A 403, 109 N. E. 600, Ann Cas. 1916B, 276; and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are inter-

ferred with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that, under the present system, the injured workman is left to bear the greater part of industrial accident loss, which, because of his limited income, he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and can not succeed without showing that its right as such are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet, as pointed out by the court of appeals

in the Jensen Case (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is, of course, recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit. *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Hurtado v. California*, 110 U. S. 516, 532, 28 L. ed. 232, 237, 4 Sup. Ct. Rep. 111, 292; *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 294, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 59 L. ed. 1204, 1210, 35 Sup. Ct. Rep. 678. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 39, 43, 60 L. ed. 874, 877, 878, 36 Sup. Ct. Rep. 482.

The fault may be that of the employer himself, or most frequently—that of another for whose conduct he is made responsible according to the maxim *respondeat superior*. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safe-

guard the employee; yet, if the alter ego, while acting within the scope of his duties, be negligent,—in disobedience, it may be, of the employer's positive and specific command,—the employer is answerable for the consequences. It can not be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are *Murray v. South Carolina R. Co.*, (1841) 1 McMull. L. 385, 398, 36 Am. Dec. 268; *Farwell v. Boston & W. R. Corp.*, (1842) 4 Met. 49, 57, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; *Hutchinson v. York, N. & B. R. Co.*, (1850) L. R. 5 Exch. 343, 351, 19 L. J. Exch. N. S. 296, 299, 14 Jur. 837, 840, 6 Eng. Ry. & C. Cas. 580; *Wigmore v. Jay*, (1850) L. R. 5 Exch. 354, 19 L. J. Exch. N. S. 300, 14 Jur. 838, 841; *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. H. L. Cas. 266, 284, 295, 4 Jur. N. S. 767, 6 Week. Rep. 664, 19 Eng. Rul. Cas. 107. And see *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 483, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 647, 29 L. ed. 755, 758, 6 Sup. Ct. Rep. 590. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice principal or alter ego of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See *Knutter v. New York & N. J. Teleph. Co.*, 67 N. J. L. 646, 650-653, 58 L. R. A. 808, 52 Atl. 565, 12 Am. Neg. Rep. 109. It needs no argument to show that such a rule is subject to modification or abrogation by a state upon proper occasion.

The same may be said with respect to the general doc-

trine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them; in either of which cases he does assume them, if he continues in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he receive such an assurance, then, pending performance of the promise, the employee does not, in ordinary cases, assume the special risk *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L. R. A. 1915C, 1 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, 239 U. S. 595, 599, 60 L. ed. 458, 461, 36 Sup. Ct. Rep. 180. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject in their bearing upon the employer's responsibility, are subject to legislative change for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employ-

er's liability for personal injuries to the employee. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 208, 32 L. ed. 107, 108, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Her- rick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Min- nesota Iron Co. v. Kline*, 199 U. S. 593, 598, 50 L. ed. 322, 325, 26 Sup. Ct. Rep. 159, 19 Am. Neg Rep. 625; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 53, 54 L. ed. 921, 928, 47 L. R. A. (N. S.) 84, 30 Sup. Ct. Rep. 676; *Chicago, I & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; *Wilmington Star Min. Co. v. Fulton*, 205 U. S. 60, 73, 51 L. ed. 708, 715, 27 Sup. Ct. Rep. 412; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606. A correspond- ing power on the part of Congress, when legislating within its appropriate sphere, was sustained in *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. And see *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 97, 54 L. ed. 106, 111, 30 Sup. Ct. Rep. 21; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621.

It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures ap- propriate. Nor is it necessary, for the purposes of the pres- ent case, to say that a State might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as be- tween employer and employee, without providing a reason- ably just substitute. Considering the vast industrial or- ganization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earn- ers, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance up- on the probable permanence of an established body of law

governing the relation, it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject matter are not placed by the 14th Amendment beyond the reach of the lawmaking power of the state; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

. We will consider, first, the scheme of compensation, de-

ferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's willful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we can not ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both, the employee is to contribute his personal services, and for these is to receive wages, and, ordinarily, nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and, of necessity, bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sus-

tain an injury not mortal, but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power,—a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall,—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability with-

out fault is not a novelty in the law. The common-law liability of the carrier, of the innkeeper, or him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 1, 22, 41 L. ed. 611, 619, 17 Sup. Ct. Rep. 243; *Chicago, R. I. & P. R. Co. v. Zerneck*, 183 U. S. 582, 586, 46 L. ed. 339, 340, 22 Sup. Ct. Rep. 229.

We have referred to the maxim, *respondeat superior*. In a well-known English case, *Hall v. Smith*, 2 Bing. 156, 160, 130 Eng. Reprint, 265, 9 J. B. Moore 226, 2 L. J. C. P. 113, this maxim was said by Best, Ch. J., to be "bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And this view has been adopted in *New York. Cardot v. Barney*, 63 N. Y. 281, 287, 20 Am. Rep. 533. The provision for compulsory compensation, in the act under consideration, can not be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote,—the primary cause, as it may be deemed,—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the law-maker reasonably may have been influenced by the belief that, in modern industry, the utmost diligence in the employer's service is in some degree inconsistent with ade-

quate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it can not be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or, in case of his death, to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of the constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, 446, L. R. A. 1915C 960, 35 Sup. Ct. Rep. 240. And this is the other: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the

[14th] Amendment to secure." *Truax v. Raich*, 239 U. S. 33, 41, 60 L. ed. 131, 135, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it can not be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer." *Holden v. Hardy*, 169 U. S. 366, 397, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383. It can not be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable;" and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. *Chicago, B. & Q. R. Co v. McGuire*, 219 U. S. 549, 571, 55 L. ed. 328, 340, 31 Sup. Ct. Rep. 259; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 52, 56 L. ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery,

tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees, arising out of the employment, bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 545, 56 L. ed. 875, 879, 32 Sup. Ct. Rep. 606.

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th Amendment. The denial of a trial by jury is not inconsistent with "due process." *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Frank v. Mangum*, 237 U. S. 309, 340, 59 L. ed. 960, 985, 35 Sup. Ct. Rep. 582.

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in the exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this can not be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, 650, 58 L. ed. 1135, 1137, 34 Sup. Ct. Rep. 678, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the 14th Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of

three ways: (a) State insurance; (b) insurance with an authorized insurance corporation or association; or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the Commission, deposited securities to the amount of \$300,000, under § 50, and \$30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the state, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been, and presumably will not be, construed so as to give an unbridled discretion to the Commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its pay roll (about \$50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the state might, consistently with the 14th Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the state to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to com-

ply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

J. C. HAWKINS, Appt.,

V.

JOHN L. BLEAKLY, ET AL.

— U. S. —, 37 Sup. Ct. Rep. 255.

An appeal from the District Court of the United States for the Southern District of Iowa to review a decree dismissing a suit to restrain the enforcement of the Iowa Workmen's Compensation Act. Affirmed.

See same case below, 220 Fed. 378.

The facts are stated in the opinion.

Messrs. Robert Ryan, James P. Hewitt, and F. G. Ryan for appellant.

Messrs. Henry E. Sampson and John T. Clarkson, and Mr. George Cosson, Attorney General of Iowa, for appellees.

Mr. Justice Pitney delivered the opinion of the court:

This is a suit in equity, brought by appellant in the United States district court, to restrain the enforcement of an act of the general assembly of the state of Iowa, approved April 18, 1913, relating to employers' liability and workmen's compensation; it being chap. 147 of Laws of Iowa, 35 G. A.; embraced in Iowa Code, Supp. of 1913, § 2477m. The bill sets forth that complainant is an employer of laborers within the meaning of the act, but has rejected its provisions, alleges that the statute is in contravention of the Federal and state constitutions, etc., etc. A motion

to dismiss was sustained by the district court (220 Fed. 378), and the case comes here by direct appeal, because of the constitutional question, under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215].

Since the decision below, the supreme court of Iowa, in an able and exhaustive opinion, has sustained the act against all constitutional objections, at the same time construing some of its provisions. *Hunter v. Colfax Consol. Coal Co.*, — Iowa, —, L. R. A. —, —, 154 N. W. 1037, 157 N. W. 145, 11 N. C. C. A. 886. Hence no objection under the state constitution is here pressed, and we, of course, accept the construction placed upon the act by the state court of last resort.

As to private employers, it is an elective workmen's compensation law, having the same general features found in the recent legislation of many of the states, sustained by their courts. See *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Borgnis v. Falk Co.*, 147 Wis. 327, 37 L. R. A. (N. S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L. R. A. (N. S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Sexton v. Newark Dist. Teleg. Co.*, 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569, 86 N. J. L. 701, 91 Atl. 1070; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C 304, 5 N. C. C. A. 410; *Victor Chemical Works v. Industrial Board*, 274 Ill. 11, 113 N. E. 173; *Matheson v. Minneapolis Street R. Co.*, 126 Minn. 286, L. R. A. 1916D 412, 148 N. W. 71, 5 N. C. C. A. 871; *Shade v. Ash Grove Lime & Portland Cement Co.*, 92 Kan. 146, 139 Pac. 1193, 5 N. C. C. A. 763, 93 Kan. 257, 144 Pac. 249; *Sayles v. Foley*, — R. I. —, 96 Atl. 340; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648; *Middleton v. Texas Power & Light Co.*, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873. The main purpose of the act

is to establish, in all employments except those of household servants, farm laborers, and casual employees, a system of compensation according to a prescribed schedule for all employees sustaining injuries arising out of and in the course of the employment, and producing temporary or permanent disability, total or partial, and, in case of death resulting from such injuries, a contribution towards the support of those dependent upon the earnings of the employee; the compensation in either case to be paid by the employer in lieu of other liability, and acceptance of the terms of the act being presumed unless employer or employee gives notice of an election to reject them. To this main purpose no constitutional objection is raised, the attack being confined to particular provisions of the law.

Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to compel him to accept the compensation features of the act, since it is provided that an employer rejecting these features shall not escape liability for personal injury sustained by an employee, arising out of and in the usual course of the employment, because the employee assumed the risks of the employment, or because of the employee's negligence, unless this was willful and with intent to cause the injury, or was the result of intoxication, or because the injury was caused by the negligence of a coemployee. But it is clear, as we have pointed out in *New York C. R. Co. v. White*, No. 320, decided this day, 243 U. S. —, ante, 247, 37 Sup. Ct. Rep. 247, that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit, and that the 14th Amendment does not prevent a state from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to.

The same may be said as to the provision that, in an action against an employer who has rejected the act, it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to

rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself, and not conclusive of the rights of the party, does not constitute a denial of due process of law. *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 42, 55 L. ed. 78, 79, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 436, Ann. Cas. 1912A 463, 2 N. C. C. A. 243.

Objection is made to the provision in § 3, that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and if it be found that the employer or his agent made such a request or suggestion, the employee shall be conclusively presumed to have been unduly influenced, and his rejection of the act shall be void. Passing the point that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees (*New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; *Rosenthal v. New York*, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas 1914B 71; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Hendrick v. Maryland*, 235 U. S. 610, 621, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140), it is sufficient to say that the criticised provision evidently is intended to safeguard the employee from all influences that might be exerted by the employer to bring about his dissent from the compensation features of the act. The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common-law rules of employer's liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

It is said that there is a denial of due process in that part of the act which provides for the adjustment of the compensation where the employer accepts its provisions. In case of disagreement between an employer and an injured employee, either party may notify the Industrial Commissioner, who thereupon shall call for the formation of an arbitration committee consisting of three persons, with himself as chairman. The committee is to make such inquiries and investigations as it shall deem necessary, and its report is to be filed with the Industrial Commissioner. If a claim for review is filed, the Commissioner, and not the committee, is to hear the parties, may hear evidence in regard to pertinent matters, and may revise the decision of the committee in whole or in part, or refer the matter back to the committee for further findings of fact. And any party in interest may present the order or decision of the Commissioner, or the decision of an arbitration committee from which no claim for review has been filed, to the district court of the county in which the injury occurred, whereupon the court shall render a decree in accordance therewith, having the same effect as if it were rendered in a suit heard and determined by the court, except that there shall be no appeal upon questions of fact or where the decree is based upon an order or decision of the Commissioner which has not been presented to the court within ten days after the notice of the filing thereof by the Commissioner. With respect to these provisions, the supreme court of Iowa held (154 N. W. 1064): "Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. . . . We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the courts all jurisdiction in the premises. . . . We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it ex-

ceeded—could inquire whether the act was being enforced against one who had rejected it, whether the claiming employee was an employee, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted, or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act.” Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545, 58 L. ed. 713, 719, 34 Sup. Ct. 359.

Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the 14th Amendment. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Frank v. Mangum*, 237 U. S. 309, 340, 59 L. ed. 969, 35 Sup. Ct. Rep. 582; *New York C. R. Co. v. White*, 243 U. S. —, ante, 247, 37 Sup. Ct. Rep. 247.

It is elaborately argued that, aside from the 14th Amendment, the inhabitants of the state of Iowa are entitled to this right, because it was guaranteed by the Ordinance of July 13, 1787, for the government of the Northwest Territory (1 Stat. at L. 51, note), in these terms: “The inhabitants of the said territory shall always be entitled to the benefits of . . . the trial by jury.” The argument is rested, first, upon the ground that Iowa was

a part of the Northwest Territory. This is manifestly untenable, since that territory was bounded on the west by the Mississippi river, and Iowa was not a part of it, but of the Louisiana Purchase. But, secondly, it is contended that the guaranties contained in the ordinance were extended to Iowa by the act of Congress approved June 12, 1838, establishing a territorial government (chap. 96, § 12, 5 Stat. at L. 235, 239), and by the act for the admission of the state into the Union. Acts of March 3, 1845, chaps. 48 and 76, 5 Stat. at L. 742, 789; Act of August 4, 1846, chap. 82, 9 Stat. at L. 52; Act of December 28, 1846, chap. 1, 9 Stat. at L. 117; 1 Poore, Charters & Const. 331, 534, 535, 551. This is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal like any such regulation; and the act for admitting the state, so far from perpetuating any particular institution previously established, admitted it "on an equal footing with the original states in all respects whatsoever." The regulation, although embracing provisions of the ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a state and the adoption of a state Constitution, than other acts of Congress for the government of the territory. All were superseded by the state Constitution. *Permoli v. New Orleans*, 3 How. 589, 610, 11 L. ed. 739, 748; *Coyle v. Smith*, 221 U. S. 559, 567, 570, 55 L. ed. 853, 858, 859, 31 Sup. Ct. Rep. 688; *Cincinnati v. Louisville & N. R. Co.*, 223 U. S. 390, 401, 56 L. ed. 481, 484, 32 Sup. Ct. Rep. 267. The state of Iowa, therefore, is as much at liberty as any other state to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration.

Section 5 is singled out for criticism, as denying to employers the equal protection of the laws. It reads: "Where the employer and employee elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employee had not re-

jected the terms, conditions and provisions thereof." As we have shown, if the employer rejects the act, he remains liable for personal injury sustained by an employee, arising out of and in the usual course of the employment, and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a coemployee, or even by showing that the plaintiff was negligent, unless such negligence was willful and with intent to cause the injury, or was the result of intoxication on the part of the injured party. This is the result whether the employee on his part accepts or rejects the act. But where the employee rejects it and the employer accepts it, then, by § 3b, "the employer shall have the right to plead and rely upon any and all defenses including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act;" with a proviso not material to the present point. We can not say that there is here an arbitrary classification within the inhibition of the "equal protection" clause of the 14th Amendment. All employers are treated alike, and so are all employees; and if there be some difference as between employer and employee respecting the inducements that are held out for accepting the compensation features of the act, it goes no further than to say that, if neither party is willing to accept them, the employer's liability shall not be subject to either of the several defenses referred to. As already shown, the abolition of such defenses is within the power of the state, and the legislation can not be condemned when that power has been qualifiedly exercised, without unreasonable discrimination.

Section 42 of the act provides: "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. . . .

And if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one (1) of this act." The supreme court of Iowa, in the Hunter Case, said of § 42 (154 N. W. 1056): "This clearly shows that no employer is compelled to insure unless he has accepted, and thus become subject to, the act;" proceeding, however, to discuss the case further upon the hypothesis that all employers named in the act were compelled to maintain insurance. In view of the construction adopted, it is unnecessary for us to pass upon the question of compulsory insurance in this case, appellant not having accepted the act.

Other contentions are advanced, but they are without merit and call for no particular mention.

Decree affirmed.

MOUNTAIN TIMBER COMPANY, Plff. in Err.,

V.

STATE OF WASHINGTON.

— U. S. —, 37 Sup. Ct. Rep. 260.

In error to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Cowlitz County, in that state, in favor of the state in an action to recover certain premiums alleged to be due under the Workmen's Compensation Act. Affirmed.

See same case below, 75 Wash. 581, L. R. A. —, —, 135 Pac. 645, 4 N. C. C. A. 811.

The facts are stated in the opinion.

Messrs. F. Markoe Rivinus, Theodore W. Reath, Coy Burnett and Edmund C. Strode for plaintiff in error.

Mr. W. V. Tanner, Attorney General of Washington, for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

This was an action brought by the state against plaintiff in error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the state of Washington, to recover under chap. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated pay roll of the workmen employed by plaintiff in error during the three months beginning, October 1, 1911. Plaintiff in error by demurrer raised objections to the act, based upon the Constitution of the United States. The Supreme Court of Washington, overruled them, and affirmed a judgment in favor of the state (75 Wash. 581, L. R. A. —, —, 135 Pac. 645, 4 N. C. C. A. 811), following its previous decision in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A. (N. S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; and the case comes here under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214].

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death. We will recite its provisions to an extent sufficient to show the character of the legislation.

The first section contains a declaration of policy, reciting that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, and in practice proves to be economically unwise and un-

fair; that the remedy of the workman has been uncertain, slow, and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; and that the welfare of the state depends upon its industries, and even more upon the welfare of its wage workers. "The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

The second section, declaring that while there is a hazard in all employment, certain employments are recognized as being inherently constantly dangerous, enumerates those intended to be embraced within the term "extra hazardous," including factories, mills, and workshops where machinery is used, printing, electrotyping, photoengraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works, logging, lumbering and shipbuilding operations, logging, street, and interurban railroads, steamboats, railroads, and a number of others; at the same time declaring that if there be or arise any extra hazardous occupation not enumerated, it shall come under the act, and its rate of contribution to the accident fund shall be fixed by the department created by the act upon the basis of the relation which the risk involved bears to the risks classified, until the rate shall be fixed by legislation. The third section contains a definition of terms, and, among them: "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an

employer carrying on or conducting any of the industries scheduled or classified in § 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer;" with a proviso giving to a workman injured while away from the plant through the negligence or wrong of another not in the same employ, or, if death result from the injury, to his widow, children, or dependents, an election whether to take under the act or to seek a remedy against the third party. "Injury" is defined as an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total pay roll for the year, "the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." The application of the act as between employers and workmen is made to date from the first day of October, 1911, the payment for that year to be made prior to that date and upon the basis of the pay roll of the last preceding three months of operation. At the end of each year an adjustment of accounts is to be made upon the basis of the actual pay roll. The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being $11\frac{1}{2}$ per cent, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10 per cent, in the case of powder works. The same section establishes forty-seven different classes of industry, and declares:

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in

any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: Provided, any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund. The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act. In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown by experience. . . . If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate shall be subject to restoration to the schedule rate. . . . If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the first day of February of the following year by the employers of that

class in proportion to their respective payments for the past year."

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided, such payment shall be in lieu of any and all rights of action against any person whomsoever. Where death results from the injury, the compensation includes the expenses of burial, not exceeding \$75 in any case, a monthly payment of \$20 for the widow or invalid widower, to cease at re-marriage, and \$5 per month for each child under the age of sixteen years until that age is reached, but not exceeding \$35 in all, with a lump sum of \$240 to a widow upon her re-marriage; if the workman leaves no wife or husband, but a child or children under the age of sixteen years, there is to be a monthly payment of \$10 to each child until that age is reached; but not exceeding a total of \$35 per month; if there be no widow, widower, or child under the age of sixteen years, other dependent relatives are to receive monthly payments equal to 50 per cent of the average monthly support actually received by such dependent from the workman during the twelve months next preceding his injury, but not exceeding a total of \$20 per month. For permanent total disability of a workman, he is to receive, if unmarried, \$20 or, if married, \$25 per month, with \$5 per month additional for each child under the age of sixteen years, but not exceeding \$35 per month in all. (Section 7 provides that the monthly payment, in case of death or permanent total disability, may be converted into a lump sum payment, not in any case exceeding \$4,000, according to the expectancy of life.) For temporary total disability there is a somewhat different scale, compensation to cease when earning power is restored. For permanent partial disability the workman is to receive compensation in a lump sum equal to the extent of the injury, but not exceeding \$1,500.

By § 6, if injury or death results to a workman from his

deliberate intention to produce it, neither he nor his widow, child or dependents shall receive any payment out of the fund. If injury or death results to a workman from the deliberate intention of the employer to produce it, the workman or his widow, child, or dependent shall have the privilege to take under the act, and also have a cause of action against the employer for any excess of damage over the amount receivable under the act.

By § 19 provision is made for the adoption of the act by the joint election of any employer and his employees engaged in works not extra hazardous. By § 21, the Industrial Insurance Department is created, consisting of three commissioners. By § 20, a judicial review is given, in the nature of an appeal to the superior court, from any decision of the department upon questions of fact or of the proper application of the act, but not upon matters resting in the discretion of the department. Other sections provide for matters of detail, and § 11 renders void any agreement by employer or workman to waive the benefit of the act.

From this recital it will be clear that the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry, at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

While plaintiff in error is an employer, and can not succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and

the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers.

However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen's Compensation Act, sustained in *New York C. R. Co. v. White*, decided this day [243 U. S. —, ante, 247, 37 Sup. Ct. Rep. 247]. It is true that in the Washington act the state fund is the sole source from which the compensation shall be paid, whereas the New York act gives to the employer an option to secure the compensation either through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state Commission. But we find here no ground for a distinction unfavorable to the Washington law.

So far as employers are concerned, however, there is a marked difference between the two laws, because of the enforced contributions to the state fund that are characteristic of the Washington act, and it is upon this feature that the principal stress of the argument for plaintiff in error is laid.

Two of the constitutional objections may be disposed of briefly. It is urged that the law violates § 4 of article 4 of the Constitution of the United States, guarantying to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts. *Luther v. Borden*, 7 How. 1, 39, 42, 12 L. ed. 581, 597, 599; *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kiernan v. Portland*, 223, U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 231; *Marshall v. Dye*, 231 U. S. 250, 256, 58 L. ed. 206, 207, 34 Sup. Ct. Rep. 92; *Ohio ex rel. Davis v. Hildebrandt*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708.

The 7th Amendment, with its provision for preserving

the right of trial by jury, is invoked. It is conceded that this has no reference to proceedings in the state courts (Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, 963, L. R. A. 1917A, 86, 36 Sup. Ct. Rep. 595), but it is urged that the question is material for the reason that if the act be constitutional it must be followed in the Federal courts in cases that are within its provisions. So far as private rights of action are preserved, this is no doubt true; but, with respect to those we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury.

The only serious question is that which is raised under the "due process of law" and "equal protection" clauses of the 14th Amendment. It is contended that since the act unconditionally requires employers in the enumerated occupations to make payments to a fund for the benefit of employees, without regard to any wrongful act of the employer, he is deprived of his property, and of his liberty to acquire property, without compensation and without due process of law. It is pointed out that the occupations covered include many that are private in their character, as well as others that are subject to regulation as public employments, and it is argued that, with respect to private occupations (including those of plaintiff in error), a compulsory compensation act does not concern the interests of the public generally, but only the particular interests of the employees, and is unduly oppressive upon employers, and arbitrarily interferes with and restricts the management of private business operations.

The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1 in that year, actions pending and causes of action existing on September 30 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the

relation of employer and employee in the hazardous occupations in futuro.

If the legislation could be regarded merely as substituting one form of employer's liability for another, the points raised against it would be answered sufficiently by our opinion in *New York C. R. Co. v. White*, 243 U. S. —, ante, 247, 37 Sup. Ct. Rep. 247, where it is pointed out that the common-law rule confining the employer's liability to cases of negligence on his part or on the part of others for whose conduct he is made answerable, the immunity from responsibility to an employee for the negligence of a fellow employee, and the defenses of contributory negligence and assumed risk, are rules of law that are not beyond alteration by legislation in the public interest; that the employer has no vested interest in them nor any constitutional right to insist that they shall remain unchanged for his benefit; and that the states are not prevented by the 14th Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries to their employees, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall; that is, upon particular injured employees and their dependents.

But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not; so that, however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors.

In the present case the supreme court of Washington (75 Wash. 581, 583) sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the Clausen Case (65 Wash. 156, 203, 207), which was rested principally upon that power, but also (pp. 203, 207) sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect. *Henderson v. New York* (*Henderson v. Wickham*), 92 U. S. 259, 268, 23 L. ed. 543, 547; *Stockard v. Morgan*, 185 U. S. 27, 36, 46 L. ed. 785, 794, 22 Sup. Ct. Rep. 576; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 28, 30, 54 L. ed. 355, 366, 367, 30 Sup. Ct. Rep. 190; *Ludwig v. Western U. Teleg. Co.*, 216 U. S. 146, 162, 54 L. ed. 423, 429, 30 Sup. Ct. Rep. 280; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99. And the Federal Constitution does not require a separate exercise by the states of their powers of regulation and of taxation. *Gundling v. Chicago*, 177 U. S. 183, 189, 44 L. ed. 725, 729, 20 Sup. Ct. Rep. 633.

Whether this legislation be regarded as a mere exercise of power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the 14th Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek

to overthrow it. *Erie R. Co. v. Williams*, 233 U. S. 685, 699, 58 L. ed. 1155, 1160, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 761. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

As to the first point: 'The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499. "The police power of a state is as broad and plenary as its taxing power." *Kidd v. Pearson*, 128 U. S. 1, 26, 32 L. ed. 346, 352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. In *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, the court, by Mr. Justice Field, said: "Neither the [14th] Amendment—broad and comprehensive as it is—nor any other Amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special bur-

dens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.” It seems to us that the considerations to which we have adverted in *New York C. R. Co. v. White*, *supra*, as showing that the Workmen’s Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the state of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that, in the ordinary course of things, frequently and inevitably produce disabling or mortal injuries to the human beings employed, is not a matter of wholly private concern. It hardly would be questioned that the state might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and

dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation, or as tending to encourage the performance of the public duty of defense. But is the state powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the state? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the supreme court of Washington said: "Under our statutes the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance on his master's premises." *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158, Pac. 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the state powerless to succor the wounded except they be reduced to the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the state are not thus circumscribed by the 14th Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry can not be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. With respect to the scale of com-

pensation, we repeat what we have said in *New York C. R. Co. v. White*, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question,—the distribution of the burden,—there is no criticism upon the act in its details. As we have seen, its 4th section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay roll of the industry can not be deemed an arbitrary adjustment, in view of the legislative declaration that it is “deemed the most accurate method of equitable distribution of burden in proportion to relative hazard.” It is a matter of common knowledge that, in the practice of insurers, the pay roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of

an intelligent effort to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are nonhazardous. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359. But further, the question whether any of the industries enumerated in § 4 is nonhazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident, there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1915, quoted in the margin, above, which, however, can not affect the decision of the present case. But in the absence of any particular showing of erroneous classification,—and there is none,—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the 14th Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has de-

clared in the 1st section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in *New York C. R. Co. v. White*, the state is at liberty, notwithstanding the 14th Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the state from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a state, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability, with consequent loss of earning power, among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York C. R. Co. v. White*, 243 U. S.—, ante, 247, 37 Sup. Ct. Rep. 247, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act can not be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that, if charged to the industry, it leaves no sufficient margin for

reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the state is at liberty, in the interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry, they will occur, we deem that the state acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it can not be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue, proportioned to the special injury attributable to the activities taxed, is not novel. In *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A 487, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the state an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of de-

positors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation, but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the state. In *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140, and *Kane v. New Jersey*, 242 U. S. 160, 169, ante, 30, 37 Sup. Ct. Rep. 30, we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential, and whose operations over them are peculiarly injurious. And see *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 394, 395, 35 L. ed. 1051, 1054, 1055, 12 Sup. Ct. Rep. 255, and cases cited. Many of the states have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey v. Brown*, 42 N. H. 373, 375; *Tenney v. Lenz*, 16 Wis. 566; *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183, 185, 186, 41 Am. Rep. 159, 9 N. W. 246; *Longyear v. Buck*, 83 Mich. 236, 240, 10 L. R. A. 42, 47 N. W. 234; *Cole v. Hall*, 103 Ill. 30; *Holst v. Roe*, 39 Ohio St. 340, 344, 48 Am. Rep. 459; *McGlone v. Womack*, 129 Ky. 274, 283, et seq., 17 L. R. A. (N. S.) 855, 111 S. W. 688.

We are unable to find that the act, in its general features, is in conflict with the 14th Amendment. Numerous objections are urged, founded upon matter of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in § 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain (sic) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether, as thus construed, it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware, the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution. *Bachtel v. Wilson*, 204 U. S. 36, 40, 51 L. ed. 357, 359, 27 Sup. Ct. Rep. 243; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 58 L. ed. 713, 720, 34 Sup. Ct. Rep. 359.

Judgment affirmed.

The Chief Justice, Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissent.

WILLIAM RAYMOND, Plff. in Err.,

V.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

— U. S. —, 37 Sup. Ct. Rep. 268.

In error to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District court for the Western District of Washington in favor of defendant in a personal-injury action. Affirmed.

See same case below, 147 C. C. A. 245, 233 Fed. 239.

The facts are stated in the opinion.

Messrs. John T. Casey and Thomas J. Walsh for plaintiff in error.

Messrs. Heman H. Field and George W. Korte for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

Raymond, the plaintiff in error, sued the railway company, a foreign corporation doing business in Washington, to recover damages resulting from injuries sustained by him while in its employ. The petition alleged that the defendant operated an interstate commerce railroad between Chicago and Seattle, and that, for the purpose of shortening its main line and making more efficient and expeditious its freight and passenger service, was engaged in cutting a tunnel through the mountain between Horrick's Spur and Rockdale, in Washington. It was averred that plaintiff was employed by the defendant in the tunnel as a laborer, and that, while he was at work, his pick struck a charge of dynamite which, through the defendant's negligence, had not been removed, and that from the explosion which followed he had sustained serious injuries.

The defendant's answer contained a general denial and alleged that at the time and place of the accident the railroad and Raymond were not engaged in interstate commerce, since the tunnel was only partially bored, and hence not in use as an instrumentality of interstate commerce. It was further alleged that the court was without jurisdiction to hear the cause because of the provisions of the Washington Workmen's Compensation Act (Laws 1911, chap. 74), with whose requirements the defendant had fully complied. The reply of the plaintiff admitted the facts alleged in the answer, but denied that they constituted defenses to the action.

The trial court entered a judgment for the defendant on the pleadings, and this writ of error is prosecuted to a

judgment of the court below, affirming such action: 147 C. C. A. 245, 233 Fed. 239.

Considering the suit as based upon the Federal Employer's Liability Act, it is certain, under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that, under the facts as alleged, Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the act. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992; *Minneapolis & St. L. R. Co. v. Nash*, 242 U. S. —, ante, 239, 37 Sup. Ct. Rep. 239.

It is also certain that if the petition be treated as alleging a cause of action under the common law, the court below was without authority to afford relief, as that result could only be attained under the local law, in accordance with the provisions of the Washington Workmen's Compensation Act, which has this day been decided to be not repugnant to the Constitution of the United States (*Mountain Timber Co. v. Washington*, 243 U. S. —, ante, 260, 37 Sup. Ct. Rep. 260). And this result is controlling even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state Workmen's Compensation Act (*New York C. R. Co. v. White*, 243 U. S. —, ante, 247, 37 Sup. Ct. Rep. 247).

Affirmed.

CHAPTER XI

FEDERAL ACT OF 1916—ANNOTATED

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§ 266. Development of Federal Compensation Legislation.

The following facts regarding the development of Federal accident compensation legislation are taken from the reports of the U. S. Bureau of Labor Statistics:

Life-Saving Service.

The act of May 4, 1882 (22 U. S. Stat. L., p. 57), introduced a system of compensation not only for accidental injuries but also for disease contracted in the line of duty

for certain employees of the Life-Saving Service. Sections 7 and 8 of this act read as follows:

“§ 7. If any keeper or member of a crew of a life-saving or lifeboat station shall be so disabled by reason of any wound or injury received or disease contracted in the Life-Saving Service in the line of duty as to unfit him for the performance of duty, such disability to be determined in such manner as shall be prescribed in the regulations of the service, he shall be continued upon the rolls of the service and entitled to receive his full pay during the continuance of such disability, not to exceed the period of one year, unless the general superintendent shall recommend, upon a statement of facts, the extension of the period through a portion or the whole of another year, and said recommendation receive the approval of the Secretary of the Treasury as just and reasonable; but in no case shall said disabled keeper of a crew be continued upon the rolls or receive pay for a longer period than two years.

§ 8 (as amended by act of March twenty-sixth, nineteen hundred and eight). If any keeper or member of a crew of a life-saving or lifeboat station shall hereafter die by reason of perilous service or any wound or injury received or disease contracted in the Life-Saving Service in the line of duty, leaving a widow, or a child or children under sixteen years of age, or a dependent mother, such widow and child or children and dependent mother shall be entitled to receive, in equal portions, during a period of two years, under such regulations as the Secretary of the Treasury may prescribe, the same amount, payable quarterly as far as practicable, that the husband or father or son would be entitled to receive as pay if he were alive and continued in the service: *Provided*, That if the widow shall remarry at any time during the said two years, her portion of said amount shall cease to be paid to her from the date of her remarriage, but shall be added to the amount to be paid to the remaining beneficiaries under the provisions of this section, if there be any; and if any child shall arrive at the

age of sixteen years during the said two years, the payment of the portion of such child shall cease to be paid to such child from the date on which such age shall be attained, but shall be added to the amount to be paid to the remaining beneficiaries, if there be any."

The system of compensation provided for in this law grants full pay in case of disability, for a term not exceeding two years, and compensation equal to two years' pay to the widow and children in case the injury or disease terminates fatally. All cases of injuries or disease contracted in line of duty are compensated. No provision is made for raising any question of negligence to which the injury may be due.

Railway Mail Service.

A compensation system, in general similar to the above, exists in the Post Office Department for the benefit of railway postal clerks. The Post Office Department appropriation act for 1901, approved on June 2, 1900 (31 U. S. Stat. L., p. 259), contained for the first time the following item:

"For acting clerks in place of clerks injured while on duty, \$25,000."

This permitted the continuance of salaries to injured clerks during the term of their disability, the maximum period for such payments being in practice restricted to one year, virtually establishing a system of compensation for nonfatal injuries. In the next (second) session of the Fifty-sixth Congress the appropriation for the same purpose was increased to \$35,000.

The Post Office Department appropriation act for 1903, passed in the first session of the Fifty-seventh Congress, extended the system to include a lump-sum benefit of \$1,000 to the survivors of railway mail clerks fatally injured while on duty, by the following language:

"For acting clerks, in place of clerks injured while on duty, and to enable the Postmaster General to pay the sum

of \$1,000, which shall be exempt from the payment of debts of the deceased, to the legal representatives of any railway postal clerk or substitute railway postal clerk who shall be killed while on duty or who, being injured while on duty, shall die within one year thereafter as the result of such injury, \$45,000."

The amount appropriated was found insufficient, and a deficiency appropriation of \$40,000 was made during the second session. The amount appropriated for the fiscal year 1904 was \$75,000, following which was another deficiency appropriation of \$20,000 made during the session of 1903-4, and the sum of \$110,000 was appropriated for the year ending June 30, 1905. Since that date the appropriation has been made at a uniform rate of \$100,000, until the appropriation for the year ending June 30, 1912, when \$120,000 was set aside for the two purposes of employing acting clerks and of paying compensation for accidents. The appropriation act for the year ending June 30, 1913, set aside \$130,000 for these purposes and provides that when disability continues for a part or all of a second year after injury 50 per cent of the injured clerk's salary shall be paid him during such continuance. Sea post clerks are by the same act granted the same benefits as are allowed railway postal clerks. The appropriation act for the fiscal year 1911, approved May 12, 1910, increased the amount payable in case of fatal accidents to \$2,000.

The present system, therefore, provides for disability compensation equal to full pay for the period of disability but not to exceed one year, for half-pay for a second year if disability continues, and in case of the injury resulting fatally a lump-sum payment of \$2,000 to the legal representatives of the deceased.

Under the existing legislation the following regulations have been promulgated by the Post Office Department:

"§ 1424. Whenever a railway postal clerk shall be disabled while in the actual discharge of his duties by a railroad or other accident beyond his power to control, he shall

send to the division superintendent a certificate of his attending physician or surgeon, sworn to before an officer authorized to administer oaths, who has an official seal, setting forth the nature, extent, and cause of his disability, and the probable duration of the same; and such further evidence as to the character of the disability as may be necessary shall be furnished.

(2) The division superintendent will forward the certificate, with his recommendation, to the General Superintendent of the Railway Mail Service, who will submit the matter to the Postmaster General, who may, in his judgment, the facts justifying such action, grant such disabled clerk leave of absence with pay for periods of not exceeding sixty days each, and not exceeding one year in all.

(3) A sworn statement from the attending physician must accompany every application for additional leave."

Act of May 30, 1908.

The bill H. R. 21844, which became the act of May 30, 1908, was introduced in the House of Representatives on May 12, 1908, referred to the Judiciary Committee, and reported back on May 15, 1908, on which date it passed the House after a short debate. It reached the Senate on May 18 and was referred to the Senate Committee on Judiciary, which reported it to the Senate on the same date without any essential amendments. It was extensively debated in the Senate on May 21, May 25, and May 27, and amended in many important details, though the general plan was left unchanged. The most important amendment was that extending its scope in a few directions beyond that contemplated in the original bill. It was stated by Mr. Alexander on the floor of the House that "the purpose of this bill is to compensate Government employees engaged in hazardous occupations." "Such employment," Mr. Alexander proceeded, "is practically confined to arsenals, navy yards, manufacturing establishments (such as arsenals, clothing depots, shipyards, proving grounds, powder factories, and so forth), to construction of river and harbor work, and to

work upon the Isthmian Canal." The bill, accordingly, included only those enumerated branches of service. In the Senate, however, "fortification work" and "hazardous employment in construction work in the reclamation of arid lands" were added. The minimum length of duration of disability giving rise to right for compensation was reduced from 30 days to 15; the clause penalizing for attempt to defraud under this law was eliminated as unnecessary, and the date of going into effect was changed from July 1, 1908, to August 1, 1908, to allow time for preparation of the necessary administrative machinery. The text of the act follows:

§ 1. That when, on or after August first, nineteen hundred and eight, any person employed by the United States as an artisan or laborer in any of its manufacturing establishments, arsenals, or navy yards, or in the construction of river and harbor or fortification work or in hazardous employment on construction work in the reclamation of arid lands or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission, is injured in the course of such employment, such employee shall be entitled to receive for one year thereafter, unless such employee, in the opinion of the Secretary of Commerce and Labor, be sooner able to resume work, the same pay as if he continued to be employed, such payment to be made under such regulations as the Secretary of Commerce and Labor may prescribe: *Provided*, That no compensation shall be paid under this act where the injury is due to the negligence or misconduct of the employee injured, nor unless said injury shall continue for more than fifteen days. All questions of negligence or misconduct shall be determined by the Secretary of Commerce and Labor.

§ 2. That if any artisan or laborer so employed shall die during the said year by reason of such injury received in the course of such employment, leaving a widow, or a child or children under sixteen years of age, or a dependent parent, such widow and child or children and dependent

parent shall be entitled to receive, in such portions and under such regulations as the Secretary of Commerce and Labor may prescribe, the same amount, for the remainder of the said year, that said artisan or laborer would be entitled to receive as pay if such employee were alive and continued to be employed: *Provided*, That if the widow shall die at any time during the said year her portion of said amount shall be added to the amount to be paid to the remaining beneficiaries under the provisions of this section, if there be any.

§ 3. That whenever an accident occurs to any employee embraced within the terms of the first section of this act, and which results in death or a probable incapacity for work, it shall be the duty of the official superior of such employee to at once report such accident and the injury resulting therefrom to the head of his bureau or independent office, and his report shall be immediately communicated through regular official channels to the Secretary of Commerce and Labor. Such report shall state, first, the time, cause, and nature of the accident and injury and the probable duration of the injury resulting therefrom; second, whether the accident arose out of or in the course of the injured person's employment; third, whether the accident was due to negligence or misconduct on the part of the employee injured; fourth, any other matters required by such rules and regulations as the Secretary of Commerce and Labor may prescribe. The head of each department or independent office shall have power, however, to charge a special official with the duty of making such reports.

§ 4. That in the case of any accident which shall result in death, the persons entitled to compensation under this act or their legal representatives shall, within ninety days after such death, file with the Secretary of Commerce and Labor an affidavit setting forth their relationship to the deceased and the ground of their claim for compensation under the provisions of this act. This shall be accompanied by the certificate of the attending physician set-

ting forth the fact and cause of death, or the nonproduction of the certificate shall be satisfactorily accounted for. In the case of incapacity for work lasting more than fifteen days, the injured party desiring to take the benefit of this act shall, within a reasonable period after the expiration of such time, file with his official superior, to be forwarded through regular official channels to the Secretary of Commerce and Labor, an affidavit setting forth the grounds of his claim for compensation, to be accompanied by a certificate of the attending physician as to the cause and nature of the injury and probable duration of the incapacity, or the nonproduction of the certificate shall be satisfactorily accounted for. If the Secretary of Commerce and Labor shall find from the report and affidavit or other evidence produced by the claimant or his or her legal representatives, or from such additional investigation as the Secretary of Commerce and Labor may direct, that a claim for compensation is established under this act, the compensation to be paid shall be determined as provided under this act and approved for payment by the Secretary of Commerce and Labor.

§ 5. That the employee shall, whenever and as often as required by the Secretary of Commerce and Labor, at least once in six months, submit to medical examination, to be provided and paid for under the direction of the Secretary, and if such employee refuses to submit to or obstructs such examination his or her right to compensation shall be lost for the period covered by the continuance of such refusal or obstruction.

§ 6. That payments under this act are only to be made to the beneficiaries or their legal representatives other than assignees, and shall not be subject to the claims of creditors.

§ 7. That the United States shall not exempt itself from liability under this act by any contract, agreement, rule, or regulation, and any such contract, agreement, rule, or regulation shall be pro tanto void.

§ 8. That all acts or parts of acts in conflict herewith or providing a different scale of compensation or otherwise regulating its payment are hereby repealed.

Amending Acts.

Of the numerous bills for the amendment of this act, which have been introduced since its enactment, four have become laws, two of them relating to injured employees on the Isthmian Canal. The first was H. R. 22340, Sixty-first Congress, introduced by Mr. Mann on December 7, 1908, becoming a law on February 24, 1909 (35 U. S. Stat. L., p. 645).

The act reads as follows:

That nothing contained in the act approved, May thirtieth, nineteen hundred and eight, entitled "An act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," shall prevent the Isthmian Canal Commission, under rules to be fixed by the commission, from granting to its injured employees, whether engaged in a hazardous employment or otherwise, leave of absence with pay for time necessarily lost as a result of injuries received in the course of employment, not exceeding in the aggregate thirty days per annum: *Provided, however,* That compensation paid to such injured employees under such regulations shall be deducted from any compensation which such employees may be entitled to receive under the terms of the said act.

The following explanation of this act was made by Mr. Mann in the House (Jan. 9, 1909):

"It has been the custom of the Isthmian Canal Commission to give compensation to an injured employee whether he was engaged in hazardous employment or not, and also to give him compensation although his time kept from employment was less than 15 days; but it has been construed that the Isthmian Canal Commission, being included in the law passed at the last session, is controlled by

that law, and that under that law the former practice of the commission is changed so that now they can not pay to an injured employee any compensation unless that employment shall be called "hazardous" employment, nor can they pay him any compensation unless he is kept from work for at least 15 days. The purpose of this bill, which is asked for both by the Isthmian Canal Commission and the labor employed on the canal, is to give to the commission the power to pay to an injured employee who is kept from his work less than 15 days the pay for that time, and also to give the commission the power to pay although the employee is not technically engaged in hazardous employment."

This compensation was paid to the employees of the Isthmian Canal Commission under regulations adopted on June 11, 1907, and effective since July 1, 1907. This special accident leave could not exceed 30 days, and was known as "meritorious sick leave," which was over and above the ordinary sick-leave provisions. But by a decision of September 1, 1908, the comptroller, upon request of the Isthmian Canal Commission for an advance decision as to the legality of these payments, ruled: "That this enactment (act of May 30, 1908) is exclusive, after it came into effect, and that it is no longer in the power of the commission by regulation, past or present, to enlarge or diminish the provisions of that act," and that the commission was not authorized to pay to an employee who is entitled to the benefits of the act of May 30, 1908, any compensation for an injury, if the period for which he is incapacitated is 15 days or less; nor to pay compensation to an employee injured through his own negligence or misconduct, whether the duration of the injury is more or less than 15 days. It was also ruled that the act made illegal any payments of compensation to employees not covered by the act. (XV Decisions of the Comptroller of the Treasury, p. 161.)

The act of February 24, 1909, therefore re-established

the conditions existing under the regulations of June 11, 1907, legalizing the compensation of injuries lasting less than 15 days, and also injuries causing disability not exceeding 30 days to persons in nonhazardous occupations on the Isthmian Canal; it also gave an option in reference to cases causing disability over 15 days but not over 30 days, which may, since this enactment, be compensated either under the act of May 30, 1908, or that of February 24, 1909. As a matter of fact, the Isthmian Canal Commission decided not to avail itself of this provision of the law, in order to prevent confusion from the complexity of reports, and practically all cases causing disability of over 15 days continued to be adjudicated by the Department of Commerce and Labor under the act of May 30, 1908, until March 4, 1911. On this date a second amending law (36 U. S. Stat. L., p. 1453) took effect, being section 5 of the sundry civil appropriation bill for the fiscal year ending June 30, 1912. By this amendment the entire administration of the law, in so far as it affects employees of the Isthmian Canal Commission, is transferred to that commission, the law is extended in scope so as to include all employees of the commission without reference to the hazardous or non-hazardous character of their employment; and one year is allowed for the filing of claim; in case of death, instead of 90 days, as in the original act. The section in question is as follows:

“§ 5. That hereafter the act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment shall apply to all employees under the Isthmian Canal Commission when injured in the course of their employment, and claims for compensation on account of injury or death resulting from an accident occurring hereafter shall be settled by the chairman of the Isthmian Canal Commission, who shall, as to such claims and under such regulations as he may prescribe, perform all the duties now devolving upon the Secretary of Commerce and

Labor: *Provided*, That when an injury results in death claim for compensation on account thereof shall be filed within one year after such death."

The third amending act was approved, March 11, 1912 (37 Stat., 7), and has the effect of including employees engaged in hazardous work under the Bureau of Mines or the Forestry Service of the United States under the provisions of the original act. This amendment is as follows:

"That the provisions of the act approved, May thirtieth, nineteen hundred and eight, entitled 'An act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment,' shall, in addition to the classes of persons therein designated, be held to apply to any artisan, laborer, or other employee engaged in any hazardous work under the Bureau of Mines or the Forestry Service of the United States: *Provided*, That this act shall not be held to embrace any case arising prior to its passage."

The fourth amendment is found in the act of July 27, 1912, authorizing additional aids in the Lighthouse Service, etc. (37 Stat., 238, 239), and is as follows:

"And hereafter the benefits of the act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes, page five hundred and fifty-six), entitled 'An act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment,' shall be extended to persons employed by the United States in any hazardous employment in the Lighthouse Service. . . ."

§ 267. The Act of 1916 Supersedes All of the Former Federal Acts.

The federal workmen's compensation act of 1916 was intended to replace the rights and remedies supplied by all former acts. The new act is reproduced in the following pages section by section and is annotated with the decisions of the Solicitor for the Department of Labor under the act of 1908 wherever deemed applicable to this act. Cross

references are also given to treatment of similar questions in other portions of this book.

SECTION I.

To Whom the Act Applies.

An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes.

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

§ 268. Who Is an Employee of the United States?

The word "employee" alone is used in the first section of the act, but in section 40, it is defined as follows: "The term 'employee' includes all civil employees of the United States." It is the apparent intention of the statute to exclude the class of men in the service of the United States, who are "officers of the government" as distinguished from employees. It has been estimated that the act of 1916 will apply to approximately 380,000 persons while the former act affected only 95,000, on account of its limited coverage. On the question of whether or not a person is employed by the United States the decisions of the Solicitor of the Department of Labor, under the Act of May 30, 1908, as amended, are in point. To illustrate who were considered employees of the United States, some of these opinions are cited in the following sections:

§ 269. Employees Under Act of 1908.

A plate printer in the Bureau of Engraving and Print-

ing, paid by the piece, is an employee of the United States, and not a mere contractor. In re claim of A. E. Clark, Dec. 17, 1908; No. 92, Op. Sol. [1915] 49, construing the act of 1908 the Solicitor of the Labor Department said: "The act applies to 'any person employed by the United States as an artisan or laborer' in certain branches of the Government service. A plate printer is a subordinate of one of the officers of the United States, and he received his pay direct from the United States. The fact that his pay is measured by the piece instead of by the day or month can not, in my opinion, affect his status as a 'person employed by the United States.' I am satisfied, therefore, that a plate printer who renders service to the United States and who is paid by the United States, whether by the piece or otherwise, is a 'person employed by the United States' within the meaning of the act. That he is an artisan or laborer is not questioned."

A workman employed by a Government contractor is not employed by the Government. In re claim of R. Lipscomb, Jan. 14, 1910; No. 2418, Op. Sol. [1915] 50, the Solicitor of the Labor Department said:

"Lipscomb was in the employ of the McCord Co., which company was engaged, under contract with the Government, in the construction of Lock and Dam No. 1. This work was being done under the supervision of an engineer of the Government, and while so engaged upon the work Lipscomb was injured on December 21, 1908.

Under the foregoing state of facts the question arises as above set forth and the answer to the same is found in section 1 of the act of May 30, 1908, wherein the persons entitled to the benefits of the act are described as follows:

"That when, on or after August first, nineteen hundred and eight, any person employed by the United States as an artisan or laborer . . ."

The question herein presented is whether Mr. Lipscomb was employed by the United States within the meaning of the act. It would seem almost impossible to make

the act any clearer than was done by the words as used therein, limiting the benefits thereof to 'any person employed by the United States.' Such wording was evidently intended to limit the application of the act to the classes mentioned therein in the immediate employ of the Government, or in other words those employees between whom and the Government some privity existed. . . .

As Mr. Lipscomb was not employed by the United States, I am therefore of the opinion that he is not such a person as would be entitled to compensation under the act of May 30, 1908."

The owner of a power boat, chartered to the Government and operated by the owner in its service, is an independent contractor and not an employee of the United States. In re claim of John Hanson, Mar. 27, 1912; No. 7586, Op. Sol. [1915] 51, the Solicitor said:

"Claim for compensation has been filed by the widow and children of John Hanson, owner and engineer of a launch which was hired by the Engineer Office of the War Department at New York, N. Y., under an agreement between the officials in charge of river and harbor improvement work in East River and Mr. Hanson. . . .

The United States Supreme Court, citing this case in *Sturgis v. Boyer* (24 Howard, 123), said: 'By employing a tug to transport their vessel from one point to another the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug nor ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in navigation.'

The fact of ownership of the launch indicates that decedent was in business for himself—held himself out for

hire to anyone requiring the services of a launch. He was in an independent business, ready and willing at all times to serve the public on the same basis as any other public licensed carrier for hire, which in itself is sufficient to justify the conclusion that it was not his intention to part with control of his boat or his agent, had such agent been placed in charge and, under the terms of this agreement, been subsisted and paid by him. . . .

After a careful consideration of the facts of the case, in the light of the authorities referred to, I am inclined to the opinion that the decedent was an independent contractor and not an employee or servant, and for this reason he is not to be considered as having been 'employed by the United States' as contemplated by § 1 of the act."

A workman employed and carried on the pay rolls of the Reclamation Service is employed by the United States when performing work being done by a contractor for the Government, if directed so to do by his superior. In re claim of Joseph W. Crawford, May 6, 1913, Op. Sol. [1915] 56.

A workman employed in the Forest Service was designated, with others, to perform certain work which the Government was performing under an agreement with county supervisors, the latter bearing the expense. Held that he was employed by the United States and entitled to compensation for the injury sustained while so employed. In re claim of Ben Kenney, Oct. 6, 1913, Op. Sol. [1915] 57.

A contract tie maker, paid by the piece, who boards himself and hires and pays his own help is an independent contractor and not an employee of the United States. In re contractors or jobbers at Neopit Indian sawmill, Apr. 8, 1915, Op. Sol. [1915] 58.

§ 270. What Is a "Personal Injury"?

The act of 1916 uses the words "injury" or "personal injury" consistently. It is plain that Congress had in mind the divergence of opinion as to the kind and source of disability embraced by the words "personal injury" where the

word "accident" is also used. These words are no longer used carelessly by the framers of compensation acts. Where the word "personal injury" alone is used, as in this act, it is well settled that not only injuries of a purely accidental nature are included, but also injuries directly attributable to the nature of the employment engaged, namely, occupational diseases. Whenever the words "accidental injury" or "injury by accident" are used, the coverage of the act is too narrow to include occupational diseases, but is, even then, usually, broad enough to include such diseases as are the natural and proximate result of the traumatic injury received by accident.

It is evident, therefore, that when Congress used the word "personal injury" it intended the act of 1916 to cover not only injuries by accident received in the course of employment, but also occupational diseases contracted as a result of the employment.

§ 271. The Use of "Personal Injury" in Act of 1908.

This is best set forth by quoting a small part of an extensive opinion of Mr. Wickersham as attorney general of the United States; In re claim of A. E. Clark, 27 Op. At. Gen. 346, Op. Sol. Dep. Labor [1915] 200. The facts were stated by the Attorney General, who said:

"The claimant, Alfred E. Clark, a person employed by the United States as a plate printer in the Bureau of Engraving and Printing, was injured in the course of his employment on September 3, 1908. His employment at the time of the injury consisted in working a hand press, which involved the five operations of inking the plate with a hand roller, wiping the surplus ink off the plate with a rag, polishing the plate with the hands, placing the plate on the bed of the press, and pulling it through by the handlebars. This had been the claimant's occupation for several years, and he had been accustomed to perform the various operations mentioned on an average of about 950 times a day. During the day and at the time of the injury the physical conditions of his employment were as usual, except that

the ink used was probably somewhat thicker than it should have been. The injury sustained by the claimant consisted of a condition of relaxation of the posterior ligaments (of right wrist), commonly known as a sprain, complicated by a rupture of the synovial sac surrounding the ligaments leading from the back part of the forearm to the fingers, of which the subjective symptoms were a swelling, due to the rupture, and a weakness of the flexor and extensor muscles. The injury continued (for more than fifteen days), inasmuch as it had to be treated by placing the wrist in a plaster cast and allowing it to rest for several weeks. The injury did not, however, immediately result in incapacity for work. The claimant continued to work on the day of the injury and on the day following, as well as during a part of the next day. He was then absent from work on account of the injury for six days, when he returned to work and worked for seven days. Thereafter he was absent from work on account of the injury for several weeks.

The act referred to is entitled 'An act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment.' § 1 reads as follows:

'That when on or after August first, nineteen hundred and eight, any person employed by the United States as an artisan or laborer in any of its manufacturing establishments, arsenals, or navy yards, or in the construction of river and harbor or fortification work, or in hazardous employment on construction work in the reclamation of arid lands, or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission, is injured in the course of such employment, such employee shall be entitled to receive for one year thereafter, unless such employee, in the opinion of the Secretary of Commerce and Labor, be sooner able to resume work, the same pay as if he continued to be employed, such payment to be made under such regulations as the Secretary of Commerce and Labor may prescribe: *Provided*, That no com-

pensation shall be paid under this act where the injury is due to the negligence or misconduct of the employee injured, nor unless said injury shall continue for more than fifteen days. All questions of negligence or misconduct shall be determined by the Secretary of Commerce and Labor.'

The first few lines of § 3 are as follows:

'That whenever an accident occurs to any employee embraced within the terms of the first section of this act, and which results in death or a probable incapacity for work, it shall be the duty of the official superior of such employee to at once report such accident and the injury resulting therefrom to the head of his bureau.'

The first few lines of § 4 are as follows:

'That in the case of an accident which shall result in death, the persons entitled to compensation under this act or their legal representatives shall, within ninety days after such death, file with the Secretary of Commerce and Labor an affidavit setting forth their relationship to the deceased and the ground of their claim for compensation under the provisions of this act.'

The question involved in your inquiry is whether or not the purpose of the act, as expressed in the first section and as indicated by the title, viz., to secure to employees of the United States, of the class specified, the *right* to receive compensation for injuries sustained in the course of their employment, is controlled and narrowed by the use in Sections 3 and 4 of the word 'accident.'

It will be observed that in the first and second sections of the act, which confer the right, the language employed refers broadly to *injuries* received by an employee in the course of his employment. This is safeguarded by the proviso in the first section that no compensation shall be paid where the injury is due to the negligence or misconduct of the employee injured, 'nor unless the said injury shall continue for more than fifteen days.' By § 2, if such employee shall die during the year by reason of such injury received in the course of his employment, leaving a widow

or relatives of the designated class, the amount which would have been paid to such employee during the remainder of the year is required to be divided among and paid over to such widow or other relatives in the manner provided in the act. The word 'accident' is only employed in the third and fourth sections, the third section relating to the report of the occurrence of the accident and the character of such report, and the fourth section referring to 'the case of any accident which shall result in death,' and providing for the affidavit of claim and other proofs. Later on in the fourth section occurs this paragraph:

'In the case of incapacity for work lasting more than fifteen days, the injured party desiring to take the benefit of this act shall, within a reasonable period after the expiration of such time, file . . . an affidavit setting forth the grounds of his claim for compensation, to be accompanied by a certificate of the attending physician as to the cause and nature of the injury and probable duration of the incapacity. . . .'

In other words, the statute quite consistently provides for the cases of injuries in the course of the employment, and accidents resulting in death or otherwise. The word 'injury' is employed comprehensively to embrace all the cases of incapacity to continue the work of employment, unless the injury is due to the negligence or misconduct of the employee injured—and including all cases where as a result of the employee's occupation he, without any negligence or misconduct, becomes unable to carry on his work, and this condition continues for more than 15 days. The word 'accident' is employed to denote the happening of some unusual event, producing death or injury which results in incapacity for work, lasting more than 15 days. That is to say, within the language of the statute an employee may be injured in the course of his employment without having suffered a definite accident.

This is a beneficent statute, in the nature of an act granting pensions of limited duration and of special appli-

cation. The language employed appears to me to be clear and unambiguous, and should not be so construed as to exclude from its benefits any of those cases which it fairly includes. . . .

In my opinion, for the reasons that I have attempted to indicate, the injury as you set it forth is 'an injury' within the meaning of the act of Congress approved, May 30, 1908, on account of which compensation may be paid."

§ 272. General Illustrations of "Personal Injuries" Under Act of 1908.

An artisan or laborer employed by the United States in the construction of river and harbor work, who contracted a severe cold in the course of his employment resulting in pneumonia and which incapacitated him for duty for a period lasting more than 15 days, is not entitled to compensation under the act of May 30, 1908 (35 Stat. 556). The word 'injury' as used in the above statute is in no sense suggestive of disease, nor has it ordinarily any such significance. Opinion of May 17, 1909 (27 Op. At. Gen. 346), reviewed. In re claim of John Sheeran No. 3131, 28 Op. At. Gen. 254; Op. Sol. (1915) 207.

Evidence that employee was strong and healthy up to time he complained of a hurt received while at work on heavy lifting, and that he died suddenly a few days thereafter for no other assignable cause is sufficient to show that he sustained some internal injury, though there were no external manifestations thereof. In re claim of S. A. Powers, Feb. 16, 1909; No. 416; Op. Sol. (1915) 214.

Evidence of slight blow on jaw is not evidence that tuberculosis of the cervical glands causing incapacity is an injury within the act. In re claim of Richard Hicks, May 15, 1909; No. 1063; Op. Sol. (1915) 217.

Frozen feet constitute an injury within the act. In re claim of T. F. Luttrell, May 21, 1909; No. 852; Op. Sol. (1915) 219.

A physical injury which aggravates a previous ailment so as to disable an employee, where disability would not

have been caused but for such previous ailment, is an injury within the act. In re claim of Philip Jarvis, Sept. 11, 1909; No. 1699; Op. Sol. (1915) 219.

An employee obeying orders of his superior and submitting to an operation (vaccination) ordinarily harmless, who is disabled thereby, is injured within the act. In re claim of C. B. Flora, May 25, 1910; No. 3338; Op. Sol. (1915) 226.

Injuries within the act are injuries to the person, or bodily injuries, and hence the breaking of an artificial leg is not covered by the statute. In re claim of Eulogio Rodriguez, Oct. 29, 1910; No. 3992; Op. Sol. (1915) 227.

An accidental injury received in the course of employment but arising in consequence of a disease is an injury within the act, the accident being regarded as the proximate, and the disease as the remote, cause. In re claim of E. B. Clements, Nov. 7, 1910; No. 4680; Op. Sol. (1915) 228.

The fact that an injury may be classed as a disease does not take it out of the statute. Sunstroke, though classed as a disease, is not such a disease as may be contracted in the same sense as ordinary diseases may be, but is an injury of an accidental nature, and is covered by the act. In re claim of J. J. Walsh, Mar. 16, 1911; No. 4585; Op. Sol. (1915) 231.

A severe accidental injury which, though it does not incapacitate the employee, exposes him to an infectious disease, and so weakens him that he is unable to withstand it, may thus give rise to a disability for which compensation is payable. In re claim of J. B. Atkinson, June 24, 1911; No. 6687; Op. Sol. (1915) 235.

An infection of the hand and a secondary infection of the leg, resulting from an abrasion of the skin and the accidental introduction of a foreign substance, is an injury within the act. In re claim of L. B. Green, Aug. 16, 1911; No. 6668; Op. Sol. (1915) 237.

A disease, not contracted, but caused by physical means, under circumstances involving an element of accident, is

an injury within the act. Idiopathic and traumatic diseases distinguished. In re claim of Wm. Murray, Nov. 3, 1911; No. 7051; Op. Sol. (1915) 239.

An employee overtaken while at work by a disability due to some unascertained internal disorder, not shown to have been caused by any accident or occurrence in the course of employment, is not injured within the act. In re claim of J. V. Trammell, Nov. 9, 1911; No. 7494; Op. Sol. (1915) 244.

Disability resulting from a disease directly due to a physical injury of an accidental nature, or lighted up thereby, is an injury within the act. In re claim of Washington Ellmore, Apr. 13, 1912; No. 8291; Op. Sol. (1915) 245.

A disability referable to no definite accident or occurrence, though arising in the course of employment, involving chiefly a gradual weakening, wearing out, or breaking down of the employee, is not an injury within the act. In re claim of Elizabeth Hewitt, May 21, 1912; No. 8558; Op. Sol. (1915) 248.

To constitute an injury within the act, it will suffice if an element of accident clearly appears, or if the injury is of a type which, in the interpretation of statutes of similar scope and purpose, has been accepted as properly included in the class comprehensively known as accidental injuries. In re claim of J. B. Irving, Aug. 3, 1912; No. 8937; Op. Sol. (1915) 249.

Incapacity caused by the inhalation of fine dust into the lungs in the course of employment is held to be an injury under the act. In re claim of Edward Edmonds, June 23, 1913; Op. Sol. (1915) 259.

Claimant was a painter and in the course of his employment contracted lead poisoning, an occupational disease. Distinguishing this disease from pneumonia, malaria, typhoid, or the like, it was held that the incapacity was due to an injury in the course of employment. (This opinion alters the previous ruling in the John Treiman and C. L. Schroeder cases on this subject, found at pages 204, 210.)

Op. Sol. (1915). In re claim of Willard E. Jule, July 28, 1913; Op. Sol. (1915) 261.

The employee developed a case of acute bronchitis and lead poisoning as a result of the inhalation of gas fumes from an oxyacetylene-burning machine, and it was held that the incapacity was due to an injury. In re claim of C. M. Arata, Dec. 31, 1913; Op. Sol. (1915) 264.

Claimant was engaged in scaling the inner plating of a caisson. Particles of the red lead being scaled became embedded in sore spots on the face or were inhaled into the system, causing incapacity. Held to be an injury. In re claim of Randolph A. Thayer, Jan. 12, 1914; Op. Sol. (1915) 266.

An injury by a fall which lights up or aggravates a previous ailment causing incapacity was held to be an injury within the act. In re claim of Everett Springer, Feb. 2, 1914; Op. Sol. (1915) 267.

Claimant was struck in the eye by a piece of steel, causing the loss of eye. The injury, while permanent, was stated by the United States hospital service physician to have no bearing on the physical condition. Held that he was entitled only for time physically incapacitated by the injury. In re claim of Walter E. Holden, Feb. 25, 1914; Op. Sol. (1915) 268.

Employee developed cardiac hypertrophy, causing death, as a result of the inhalation of the fumes of ether in the course of employment in a "mixing house" at the Naval Proving Ground at Indianhead, Md. Held that his death resulted from an injury. In re claim of Basil E. Clark, Apr. 11, 1914; Op. Sol. (1915) 270.

The employee in this case developed typhoid fever, which turned into pneumonia and empyema. It was claimed that the typhoid was caused by drinking water which had been contaminated and which was furnished by the Government. It was decided that the cause of incapacity was not of an accidental nature and therefore not an injury within the

meaning of the act. In re claim of Robert K. Potter, Aug. 12, 1914; Op. Sol. (1915) 272.

Compare *Vennen v. New Dell Lumber Co.*, 154 N. W. 640, L. R. A. 1916A 273, which takes the opposite view.

A disease not contracted but caused by physical means, under circumstances involving an element of accident, is an injury within the act. In re claim of Charles J. Withy, Nov. 12, 1914; Op. Sol. (1915) 273.

An injury caused by continuous strain due to the nature of the work, and which develops gradually, held to be an injury covered by the act. [Overrules *Crellin case*, Government Printing Office, June 21, 1911; Op. Sol. (1915)] In re claim of Margaret B. Sargent, Jan. 7, 1915; Op. Sol. (1915) 275.

A physical injury which aggravates a previous ailment so as to disable an employee, when disability would not have been caused but for such previous ailment, is an injury within the act. Tuberculosis superinduced by brass poisoning. In re claim of Edward Devine, Feb. 9, 1915; Op. Sol. (1915) 277.

An injury caused by strain from rushing work under a time-record efficiency system, whereby a strong, healthy man was kept under a high nerve-racking tension during every minute of an eight-hour workday, is an injury within the act. In re claim of D. C. Manning, Apr. 2, 1915; Op. Sol. (1915) 279.

§ 273. Meaning of "While in the Performance of His Duty."

These words are perhaps intended to be narrower than those used in most acts to describe the sphere of employment covered by the law. An accident could easily "arise out of and in the course of employment" and still not occur "while in the performance of his duty." This phrase probably means something similar to "scope of employment" as used at common law. In *Missouri Pac. R. R. Co. v. Mackey*, 33 Kan. 298, 315; 6 Pac. 291, it was said, "When we speak of duty as applied to a servant or employee, the matter involves his service or business." It may be said that the

above phrase refers to injuries received while the employee was actually doing things reasonably incident to the purposes for which he was employed. See Chapter III in general and §§ 100-102 in particular.

§ 274. Meaning of "In the Course of Employment" Under Act of 1908.

What the scope of this term is, can best be determined by citing the cases determined by the solicitor of the Labor Department.

An employee who, without negligence or misconduct on his part, is struck by his foreman in a fit of anger and has his arm broken, is injured in the course of his employment. In re claim of Cornelius Flemmings, Nov. 24, 1909; No. 2086; Op. Sol. (1915) 225.

A workman employed in the Canal Zone, injured while riding home from work on a labor train, was injured in the course of employment. In re claim of William Gerow, Nov. 16, 1908; No. 130; Op. Sol. (1915) 282.

A workman injured by a fall while in act of leaving shop at close of day's work is injured in course of employment. In re claim of William P. Fahey, Nov. 28, 1908; No. 155; Op. Sol. (1915) 283.

A workman employed in an arsenal, injured while "ringing out" at a time clock at the close of the day's work, was injured in the course of employment. In re claim of E. A. Rugan, Nov. 27, 1908; No. 142; Op. Sol. (1915) 285.

A fireman employed in the Canal Zone, injured while performing service outside territory under control of the United States, was injured in the course of employment. In re claim of James Nellis, Nov. 27, 1908; No. 134; Op. Sol. (1915) 285.

A workman injured by an explosion while on the premises of the Government waiting for work to begin is injured in course of employment. In re claim of Pinna Giovanni, Dec. 8, 1908; No. 254; Op. Sol. (1915) 287.

A workman injured on a highway on his way to work

is not injured in the course of employment. In re claim of Joseph Gilkey, Feb. 20, 1909; No. 520; Op. Sol. (1915) 288.

A workman in the Canal Zone injured while following a customary path on his way to work, on the premises of his employer or in the immediate vicinity thereof, was injured in the course of employment. In re claim of Joseph Chambers, May 15, 1909; No. 862; Op. Sol. (1915) 291.

A shop boy employed to work a punching machine, injured by voluntarily starting a rolling machine while the former machine was idle, was not injured in the course of employment. In re claim of Victorino Morales, June 1, 1909; No. 1114; Op. Sol. (1915) 295.

A workman bitten by a mad dog while attending to his duties was injured in the course of employment. In re claim of E. E. Bailey, July 7, 1909; No. 1300; Op. Sol. (1915) 297.

A workman whose employment required him to occupy sleeping and living quarters furnished by the Government, injured after hours, but at quarters, is injured in course of employment. In re claim of C. E. Hott, Mar. 5, 1910; No. 2736; Op. Sol. (1915) 302.

A workman injured in going to assistance of a fellow workman, attacked by a third, was not injured in the course of employment. In re claim of G. M. Armistead, June 13, 1910; No. 3543; Op. Sol. (1915) 305.

A railroad conductor on an excursion trip, when the train was run, with permission, by the employees for their own pleasure was not injured in the course of employment. In re claim of C. C. Fitzpatrick, Aug. 20, 1910; No. 4219; Op. Sol. (1915) 306.

A laborer having gotten his fingers frozen in course of employment, who later burned his fingers at home by accidentally setting fire to the bandages, was not injured as to the burn in the course of employment. In re claim of A. M. Rockwell, Mar. 1, 1911; No. 5820; Op. Sol. (1915) 307.

A watchman returning from work, injured after alighting from a labor train, while walking on the adjoining track, which was the only way of reaching the highway

leading to his home, was injured in the course of employment. In re claim of Joseph Forde, Mar. 8, 1911; No. 5964; Op. Sol. (1915) 309.

A foreman whose duty in part was to enforce discipline, injured while going to stop a fight between two of his men, was injured in the course of employment. In re claim of Wm. Wharton, Nov. 18, 1911; No. 7521; Op. Sol. (1915) 315.

A workman off duty, but on premises of employment, volunteering a piece of work and meeting with an accident resulting in his death, was not injured in the course of employment. In re claim of H. G. Simpson, Apr. 13, 1912; No. 7436; Op. Sol. (1915) 316.

Where a laborer, employed by the United States in the construction of river and harbor work, while off duty went upon a bin to talk with the man emptying gravel, about going home the following Sunday, and in the act of leaving, voluntarily and with no emergency for immediate action, attempted to empty a box of gravel, and in so doing fell overboard and was drowned, the accident is deemed not to have arisen within the course of his employment and compensation therefor is unauthorized under the act of May 30, 1908 (35 Stat., 556). In re claim of H. G. Simpson, No. 7436. Opinion of At. Gen., Op. Sol. (1915) 319.

The employee was furnished quarters on a boat for living purposes by the Government and after working hours left the boat to visit a neighboring town. Upon returning and before reaching the boat used as quarters he was drowned. It was held that death did not occur in the course of employment. In re claim of Edgar Jackson, Aug. 22, 1913; Op. Sol. (1915) 320.

Employee running with others to ring the time clock at the noon hour, after having been engaged in playing ball, held not to have been injured in the course of employment. In re claim of David Kramer, Dec. 1, 1913; Op. Sol. (1915). 322.

Claimant was on his way home after working hours and

while still on the Government premises was injured. Held to have occurred in the course of employment. In re claim of Emanuel L. Bernard, Dec. 12, 1913; Op. Sol. (1915) 323.

Claimant fell and was injured while going through the main gate of a navy yard. Held to be injured in course of employment. In re claim of M. Guerin, Jan. 6, 1914; Op. Sol. (1915) 324.

The employee, with others, was furnished living quarters on a boat by the Government. Fellow employees who had been on shore were returning for the night, and decedent started to get them in a small boat. While so doing he was drowned. Held to have occurred in the course of employment. In re claim of Bennie House, Jan. 14, 1914; Op. Sol. (1915) 325.

The employee was furnished living quarters on the premises. While en route from a store thereon to his quarters and while off duty he stepped aside from the usual path of travel to observe the operations of an electric wood saw. While standing there a piece of wood was thrown from the saw, striking and killing him. Held not to have arisen in the course of employment. In re claim of Thomas J. Gilson, Mar. 14, 1914; Op. Sol. (1915) 326.

The employee was a laborer or fire patrolman in the Forest Service, and while in quarters furnished by the Government for living purposes he attempted to clean a pistol belonging to a fellow employee. Held not to have been injured in the course of employment. In re claim of William P. Brown, June 11, 1914; Op. Sol. (1913) 328.

The employee was engaged by a Government official on one day to proceed to a certain point on a succeeding day, carrying with him for a distance of 8 miles certain tools and equipment of the Government which were necessary for the work in hand to be done. Before reaching the destination the employee was injured by one of the tools he was carrying. Held in the course of employment, which

began when he started on the journey with the tools. In re claim of S. J. Connor, Aug. 12, 1914; Op. Sol. (1915) 330.

Messenger boy employed at navy yard fell from bicycle and was injured while in the yard. Held that his subsequent death was traceable to the injury received at the time he fell. In re claim of John F. McSorley, Sept. 4, 1914; Op. Sol. (1915) 331.

Employee on the premises during noon hour stopped to pick up a baseball from the street to return it to players in the field when he was struck by an automobile. Held not injured in the course of employment. In re claim of John J. Schlechter, Sept. 26, 1914; Op. Sol. (1915) 331.

Employee walking along railroad track of Reclamation Service when going to his work and was struck by a train of that service and killed. Held that he was in the course of his employment. In re claim of Ramon Z. Gonzales, Jan. 21, 1915; Op. Sol. (1915) 333.

Employee had living quarters on boat of Government. While off duty, at about 5:30 a. m., he left his bedroom for some unknown reason, fell overboard, and was drowned. Held to be in the course of the employment. In re claim of Samuel Jenkins, Jan. 26, 1915; Op. Sol. (1915) 334.

Employee was a cook in the river and harbor work, and while going to work, crossing the river in a launch of a private party, he was drowned. Held not in course of employment. In re claim of Aaron Ware, Jan. 29, 1915; Op. Sol. (1915) 334.

A colored youth, 16 years of age, employed upon river and harbor work, left his work, taking a Government skiff to go across the river for some reason unknown to anyone but himself. As there was no definite evidence to the contrary, it was considered that he was doing something incidental or necessary to his occupation. In re claim of Walter Webb, Mar. 29, 1915; Op. Sol. (1915) 336.

§ 275. Willful Misconduct of Employee As Proximate Cause of Injury.

Words to the same effect are used in the Wisconsin act.

See § 222, citing *Nekoosa-Edwards Paper Co. v. Industrial Com. of Wis.*, 154 Wis. 105, 141 N. W. 1013, L. R. A. 1916A 348. A treatment of willful misconduct under the acts of the various States is found in Chapter IX, §§ 218-222.

§ 276. "Willful Misconduct" Under the Act of 1908.

The act of 1908 used the words "negligence or misconduct." This phrase is by no means synonymous with "willful misconduct" as used in the act of 1916. Nevertheless the following cases, decided by the Solicitor for the Labor Department, under the act of 1908, are cited because on the facts they would probably come within the meaning of the term "willful misconduct" as generally understood in other jurisdictions where the term is used. Mere negligence as commonly understood does not defeat a claim under the act of 1916.

In re claim of W. H. Taylor, Oct. 5, 1908; No. 23; Op. Sol. (1915) 411, the Solicitor said:

"I have examined the above claim, together with the evidence submitted therewith, and am of opinion that the claimant is not entitled to compensation, for the reason that the injury was due to the negligence of the claimant. The statements of the claimant himself are sufficient to bar him from the benefits of the act. In the first section the act provides that no compensation shall be paid where the injury is due to the negligence or misconduct of the employee injured, and the claimant in his examination stated that the injury was caused by a wooden plug striking him in the eye; that the said plug was blown out of a pump in consequence of the opening of a certain valve by an apprentice boy; that he directed the boy to open the valve; that he knew that the opening of the valve while a certain other valve was likewise open would cause the plug to blow out, and that it was dangerous; that it was his business to know whether the latter valve was open or closed before giving his order to the boy, but that in his hurry to complete his job before the closing hour he simply overlooked it. In answer to a question as to whether he would admit that

the injury was the result of his own carelessness, in which no one else had a share, he said:

'Yes; I admit it and have learned a lesson from it, too. The lesson I have learned is this: That I won't do any more "rush work" and take chances of getting killed or injured.'

It follows that the injury resulted from the negligence of the claimant rather than from any other cause."

In re claim of Grandville Hunt, Nov. 2, 1908; No. 419; Op. Sol. (1915) 413, the Solicitor said:

"The above claim is referred to this office with special reference to the question of negligence. The claim officer reports that the claimant was returning from his work on a labor train when he attempted to get off the train between two cars while the train was in motion, and in doing so he stumbled and a car ran over his left foot, causing the injury.

It does not appear to me that any ordinarily prudent man would attempt to get off a moving train between two cars. No necessity or excuse for this course is shown, and the division engineer expresses the opinion that the injury was due to the negligence or misconduct of the injured employee.

I conclude, therefore, that the claimant was guilty of such negligence as to bar his claim under the statute."

In re claim of Frank Alston, Nov. 27, 1908; No. 188; Op. Sol. (1915) 417, the Solicitor said:

"This claim is based upon a slight bruise on the right leg below the knee, incurred on September 16, 1908, while claimant was assisting in placing a water pipe in position. The claimant was incapacitated for more than 15 days and was injured in the course of his employment. The reporting officer states that the accident was due to the negligence or misconduct on the part of the injured employee.

It appears that Alston was engaged, with a gang of other laborers, in removing a 6-inch water pipe from a ditch. He entered the ditch to make a rope fast to one end

of the pipe and after doing so was told by the foreman to get out of the way of the pipe. Instead of doing this, he stepped to the other side of the pipe and the foreman again told him to get entirely out of the way. Alston replied that he was all right and began pulling upon the pipe to help the other men who were pulling from the outside of the ditch. The pipe swung around and struck Alston, causing his injury.

This appears to me a plain case of negligence, in taking a needless risk, and of misconduct, in practically disobeying the orders of his superior.

One 'may not close his eyes to obvious and dangerous conditions and expect to recover in case of accident.' (Williams v. Choctaw O. & G. R. Co., 149 Fed. 104.) Even a posted warning is generally sufficient to bar recovery where the employee disregards such warning. Thus, where a warning was posted that servants must not use a tramway as means of access to a mine and though the superintendent knew it was sometimes violated, a servant using the tramway could not recover. (Boyle v. Columbian Fire Proofing Co., 182 Mass. 93.)

I am of opinion, therefore, that claimant's injury was due to his own negligence or misconduct and that he should not recover."

In re claim of Nicolas Bacema, Apr. 7, 1909; No. 727; Op. Sol. (1915) 420, the Solicitor said:

"This case is submitted with reference to the question whether the injury was the result of the claimant's negligence or misconduct.

It appears that claimant, a laborer, went under a car of a train to which an engine was attached, to shelter himself from the rain. The engineer, not knowing that said claimant was under the car, started the train and a wheel of the car ran over the toes of claimant's right foot. Claimant had been told several times not to go under any train, and on this particular occasion was warned by his foreman to get out before the train had started.

This is a plain case of gross negligence and misconduct. No prudent man would get under a train having an engine attached. Hence this man would have been negligent if he had not received any warning at all, because there is no need of a specific warning against an obviously dangerous situation. (*Gibson v. Torbett*, 115 Ia. 163.) Recovery can not be had where the injury was the result of disobedience to warnings. (*Hastorf v. Hudson River Stone Supply Co.*, 110 Fed. 669.)

It is my opinion that claimant should not be compensated."

In re claim of J. W. Roberts, May 15, 1909; No. 1001; Op. Sol. (1915) 422, the Solicitor said: "This case is submitted with reference to the question whether the injury was the result of the claimant's own negligence or misconduct. It appears that he was helping to dig a trench 2 feet wide 6 feet into a sand bank when one wall caved in upon him and he was injured. His superior officer reported negligence and misconduct on the claimant's part because he remained in the trench after being twice told to come out. Such is the testimony of the foreman. Another witness, a fellow laborer, was sure that the claimant was emphatically ordered out of the trench at least once; that the foreman was careful and not to blame; that claimant seemed to want to make it appear that he was brave; and that when the foreman ordered him out claimant said that there was no danger and that he could tell when the dirt was going to cave in, in time to get out. Another fellow laborer states that claimant was warned of the danger and that orders had been given to properly brace the trench, and that claimant upon being ordered to come out had refused, stating that he had worked in more dangerous places than that. The statements of the other witness are not material, as he was working on the opposite side of the trench and heard nothing. His statements do not contradict the other testimony.

This is a plain case of misconduct, in disobeying direct

and necessary orders, and of negligence besides, in persisting in remaining in a dangerous situation.

This claimant was not only negligent, he was reckless. 'To be reckless is to be utterly regardless of consequences. (La Fayette Ry. Co. v. Adams, 26 Ind. 76; State v. Bridgman, 94 N. C. 888.) Recklessness, instead of being merely the want of ordinary care, is more nearly the want of any care. And so it is understood in common speech.' (Plummer v. Kansas City, 48 Mo. App. 484.)

It is my opinion that Roberts was grossly negligent, and is not entitled to compensation."

In re claim of James Dale, Oct. 5, 1910; No. 4584; Op. Sol. (1915) 437, the Solicitor said:

"The above-mentioned claim is forwarded to this office with special reference to the question whether the accident was due to the negligence or misconduct of the claimant.

It appears from the record that claimant received his injury while attempting to board a ferryboat, which is furnished by the Government, after the same had started on its trip. In attempting to get aboard he had made a jump, but instead of landing on the boat he fell into the water, evidently striking the stern of the boat in his fall.

There are furnished statements from the corporal of the Marine Corps in charge of the ferry float and from the sentry in charge of the boat. The former states that he attempted to stop a gang of men who were going to board the boat, but they rushed on by him; that all except the injured man stopped when they realized that the boat had left the dock.

The facts clearly show that claimant was injured by attempting to jump on the boat after it had left the wharf. Such an act would appear to be a voluntary exposure to an obvious danger and one which an ordinarily prudent man would not have done. This latter fact is established when it is seen that all the other men refrained from jumping when they realized that the boat had started. I conclude that claimant in this case was guilty of negligence and,

therefore, can not be compensated for time lost on account of the accident."

Positive rules were posted in a navy yard that employees doing work likely to result in injury to the eyes should wear goggles or shields. The claimant excused his disobedience by saying he could not work well with shields on. It was held that the violation of a positive rule or instruction directly resulting in injury amounts to negligence or misconduct. In re claim of Antonio Pagliarulo, Nov. 30, 1914; Op. Sol. (1915) 503.

In order that the violation of a rule or regulation shall constitute negligence or misconduct it must appear that reasonable efforts have been made to enforce the same. In re claim of George W. Wilhelm, Mar. 29, 1915; Op. Sol. (1915) 508.

The violation of a positive rule or instruction directly resulting in injury amounts to negligence or misconduct; but the rule or regulation must be a reasonable one; it must have been known to the employee, and it must have been enforced. The disregard of a rule which has become a dead letter is not necessarily negligence. In re claim of C. A. Weigand, Aug. 30, 1909; No. 1662; Op. Sol. (1915) 404.

§ 277. Employee's Intention to Bring About the Injury.

For construction of similar language used in the acts of the various States see chapter IX, §§ 218-225.

§ 278. Intoxication As Proximate Cause of Injury or Death.

In some of the State workmen's compensation acts intoxication of the injured employee is included in the phrase "willful misconduct." For treatment of this subject see chapter IX, § 222.

SECTION 2.

Waiting Period.

§ 2. That during the first three days of disability the employee shall not be entitled to compensation except as provided in section nine. No compensation shall at any time be paid for such period.

Compare with provisions for period of waiting generally under the acts, chapter IV, § 127.

§ 279. Waiting Period Under Act of 1908.

The waiting period under the act of 1908 was fifteen days and no compensation was due until the disability resulting from the injury had exceeded that time. But under the act of 1916 this period of waiting has been reduced to three days. There are questions concerning the waiting period in general which are applicable regardless of the length of the period. The decisions of the solicitor for the department of labor under the act of 1908 may be useful in arriving at a solution of these questions.

§ 280. The Day When the Injury Occurred Must Be Counted As the First Day of Disability.

In re claim of Scymore Fogg, Nov. 24, 1908; No. 111; Op. Sol (1915) 509, it was said: "As a matter of practical necessity, some point of time must be fixed from which to compute the period limited, and, all things considered, the most available point appears to be the hour when the injury occurred. It is immaterial in this respect whether fractions of a day are disregarded and the entire day of the injury included, or whether it be presumed that since the injury, except by possibility, can never happen on the last moment of the day; that the incapacity for work endures for some portion of the day. In either case when the incapacity lasts for 15 days thereafter, the injury continues for 'more' than 15 days. The fairness of this rule will more clearly appear from a consideration of the only alternative, namely, to eliminate entirely the day of the injury. If this view were taken, the injury would not continue for more than 15 days until 16 days had elapsed, but 16 days is not the period limited by the statute."

To the same effect, was the ruling in re claim of Frank E. Taylor, Nov. 19, 1914; Op. Sol. (1915) 542.

§ 281. The Days of Disability Need Not Be Consecutive Days.

In re claim of W. S. Frates, Apr. 30, 1909; No. 865; Op. Sol. (1915) 510, it was said: "The question involved in this case is, therefore, did the injury and resulting incapacity continue for 'more than 15 days?' The injury did continue for more than 15 days, for it began at the time of the accident on the morning of December 12, 1908, and continued until the morning of January 4, 1909. The first incapacity was on the same day, when the claimant quit work to have his wound dressed. The injury and resulting incapacity endured, therefore, during a portion of the 12th day of December. If the injury and resulting incapacity endured for 15 full days besides this, it brings the case within the purview of the act.

The claimant, after having his wound dressed, resumed his work and continued to work during working hours until the close of work on Saturday night, December 19. The next day, Sunday, the record shows, he consulted a physician, who found his hand badly infected. I think it is fair, therefore, to conclude that the incapacity for work existed on Sunday, December 20, although it was not a regular working day. Furthermore, the physician certifies that the claimant was incapacitated from December 20, 1908, to January 4, 1909. Construing the act liberally in favor of the claimant, in accordance with the general principles governing the construction of such statutes, it appears that the claimant was incapacitated for 15 days in addition to the time necessarily taken to dress the wound."

In re claim of O. P. Wells, Dec. 15, 1908; No. 135; Op. Sol. (1915) 515, it was said:

"It can not be assumed that the incapacity which existed on Saturday and which also existed on Monday was suspended on the intervening Sunday. It would be unreasonable to charge the injured employee with being able to resume work merely because there was no opportunity to work. It is different, however, where the injured employee

does actually resume work. It can not be assumed that he is incapacitated for work when he is actually at work. Therefore, the days on which he is able to work and on which he does work can not be counted in measuring the period of incapacity. But as the right to compensation arises when the incapacity has amounted to more than 15 days, and there is nothing in the act to indicate that the incapacity must be without a break, I am of opinion that the days of incapacity, whether consecutive or in broken periods, should be added together, and when they amount to 'more than 15 days' the law operates to grant the compensation."

SECTION 3.

Amount of Compensation for Total Disability.

§ 3. That if the disability is total the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of his monthly pay, except as hereinafter provided.

For treatment of total disability see Chapter IV in general and §§ 128, 131, 132, 134, 135 in particular.

SECTION 4.

Amount of Compensation for Partial Disability.

§ 4. That if the disability is partial the United States shall pay to the disabled employee during such disability a monthly compensation equal to sixty-six and two-thirds per centum of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of such partial disability. The commission may, from time to time, require a partially disabled employee to make an affidavit as to the wages which he is then receiving. In such affidavit the employee shall include a statement of the value of housing, board, lodging, and other advantages which are received from the employer as a part of his remuneration and which can be estimated in money. If the employee, when required, fails to make such affidavit, he shall not be entitled to any compensation while

such failure continues, and the period of such failure shall be deducted from the period during which compensation is payable to him.

For treatment of partial disability under the acts generally see Chapter IV and §§ 128, 133, 139, 141, in particular.

SECTION 5.

No Compensation Where Suitable Work Is Refused.

§ 5. That if a partially disabled employee refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for him, he shall not be entitled to any compensation.

SECTION 6.

Maximum and Minimum Compensation.

§ 6. That the monthly compensation for total disability shall not be more than \$66.67 nor less than \$33.33, unless the employee's monthly pay is less than \$33.33, in which case his monthly compensation shall be the full amount of his monthly pay. The monthly compensation for partial disability shall not be more than \$66.67. In the case of persons who at the time of the injury were minors or employed in a learner's capacity and who were not physically or mentally defective, the commission shall, on any review after the time when the monthly wage-earning capacity of such persons would probably, but for the injury, have increased, award compensation based on such probable monthly wage-earning capacity. The commission may, on any review after the time when the monthly wage-earning capacity of the disabled employee would probably, irrespective of the injury, have decreased on account of old age, award compensation based on such probable monthly wage-earning capacity.

SECTION 7.

No Salary or Pay During Compensation Period.

§ 7. That as long as the employee is in re-

ceipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

SECTION 8.

Annual or Sick Leaves Added to Period of Compensation.

§ 8. That if at the time the disability begins the employee has annual or sick leave to his credit he may, subject to the approval of the head of the department, use such leave until it is exhausted, in which case his compensation shall begin on the fourth day of disability after the annual or sick leave has ceased.

SECTION 9.

Medical Attention Immediately After Injury.

§ 9. That immediately after an injury sustained by an employee while in the performance of his duty, whether or not disability has arisen, and for a reasonable time thereafter, the United States shall furnish to such employee reasonable medical, surgical, and hospital services and supplies unless he refuses to accept them. Such services and supplies shall be furnished by United States medical officers and hospitals, but where this is not practicable shall be furnished by private physicians and hospitals designated or approved by the commission and paid for from the employee's compensation fund. If necessary for the securing of proper medical, surgical, and hospital treatment, the employee, in the discretion of the commission, may be furnished transportation at the expense of the employee's compensation fund.

See Chapter VII dealing with the treatment of injuries under the acts generally.

SECTION 10.

To Whom Compensation Is Payable in Case of Death.

§ 10. That if death results from the injury within six years the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay, subject to the modification that no compensation shall be paid where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury:

(A) To the widow, if there is no child, thirty-five per centum. This compensation shall be paid until her death or marriage.

(B) To the widower, if there is no child, thirty-five per centum if wholly dependent for support upon the deceased employee at the time of her death. This compensation shall be paid until his death or marriage.

(C) To the widow or widower, if there is a child, the compensation payable under clause (A) or clause (B) and in addition thereto ten per centum for each child, not to exceed a total of sixty-six and two-thirds per centum for such widow or widower and children. If a child has a guardian other than the surviving widow or widower, the compensation payable on account of such child shall be paid to such guardian. The compensation payable on account of any child shall cease when he dies, marries, or reaches the age of eighteen, or, if over eighteen, and incapable of self-support, becomes capable of self-support.

(D) To the children, if there is no widow or widower, twenty-five per centum for one child and ten per centum additional for each additional child, not to exceed a total of sixty-six and two-thirds per centum, divided among such children share and share alike. The compensation of each child shall be paid until he dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support.

The compensation of a child under legal age shall be paid to its guardian.

(E) To the parents, if one is wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, twenty-five per centum; if both are wholly dependent, twenty per centum to each; if one is or both are partly dependent, a proportionate amount in the discretion of the commission.

The above percentages shall be paid if there is no widow, widower, or child. If there is a widow, widower, or child there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower, and children, will not exceed a total of sixty-six and two-thirds per centum.

(F) To the brothers, sisters, grandparents, and grandchildren, if one is wholly dependent upon the deceased employee for support at the time of his death, twenty per centum to such dependent; if more than one are wholly dependent, thirty per centum, divided among such dependents share and share alike; if there is no one of them wholly dependent, but one or more partly dependent, ten per centum divided among such dependents share and share alike.

The above percentages shall be paid if there is no widow, widower, child, or dependent parent. If there is a widow, widower, child, or dependent parent, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower, children, and dependent parents, will not exceed a total of sixty-six and two-thirds per centum.

(G) The compensation of each beneficiary under clauses (E) and (F) shall be paid for a period of eight years from the time of the death, unless before that time he, if a parent or grandparent, dies, marries, or ceases to be dependent, or, if a brother, sister, or grandchild, dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support. The compensation of a brother, sis-

ter, or grandchild under legal age shall be paid to his or her guardian.

(H) As used in this section, the term "child" includes stepchildren, adopted children, and posthumous children, but does not include married children. The terms "brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but do not include married brothers or married sisters. All of the above terms and the term "grandchild" include only persons who at the time of the death of the deceased employee are under eighteen years of age or over that age and incapable of self-support. The term "parent" includes stepparents and parents by adoption. The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death. The term "widower" includes only the decedent's husband dependent for support upon her at the time of her death. The terms "adopted" and "adoption" as used in this clause include only legal adoption prior to the time of the injury.

(I) Upon the cessation of compensation under this section to or on account of any person, the compensation of the remaining persons entitled to compensation for the unexpired part of the period during which their compensation is payable shall be that which such persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death.

(J) In case there are two or more classes of persons entitled to compensation under this section and the apportionment of such compensation, above provided, would result in injustice, the commission may, in its discretion, modify the apportionment to meet the requirements of the case.

(K) In computing compensation under this section, the monthly pay shall be considered not to be more than \$100 nor less than \$50, but the total monthly compensation shall not exceed the monthly pay computed as provided in § 12.

(L) If any person entitled to compensation un-

der this section, whose compensation by the terms of this section ceases upon his marriage, accepts any payments of compensation after his marriage he shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

See Chapter VI for treatment of Dependency under the acts generally.

§ 282. Who Is the Widow of An Employee.

Under the act of 1908 it was decided that a woman living as the illegitimate wife of an employee in the Canal Zone does not, upon his death become his widow.

In re claim of Stanley Howell, May 8, 1909; No. 851; Op. Sol. (1915) 549, it was said:

"From the papers submitted in connection with the above claim it appears that Stanley Howell, the deceased, and Irene McKenzie had been living as man and wife for about two years immediately preceding Howell's death. In June, 1908, after they had been living together for some time, Howell obtained a license to marry the McKenzie woman, but no marriage ceremony was ever performed. While they were living together they had one child, which died shortly after birth, and the woman is now enciente.

Two claims for compensation are filed. One is dated January 30, 1909, and is made by Irene McKenzie. In this claim the name of wife is given as 'Irene McKenzie (illegitimate).' The blanks for names of children and parents are not filled out, and the claimant certifies, in the printed words of the form, that she knows of no other person entitled to compensation on account of the death of the employee. The other claim is dated February 3, 1909, and is made by Edward Davis Howell, father of deceased. This claimant in like manner certifies that he knows of no other person entitled to compensation.

The case is submitted to this office with special reference to the question whether Irene McKenzie as the

widow of deceased is entitled to the compensation or any part thereof.

The status of the parties is governed by the law of their domicile. The Civil Code of Panama is in force in the Canal Zone. Article 115 of the Code provides:

‘A marriage contract is constituted and perfected by the free and mutual consent of the contracting parties, expressed before the proper official, in the form and with the formalities and requisites established in this Code, and shall not produce any civil or political effects, if such forms, formalities, and requisites are not observed in its celebration.’

I can find nothing in the law which would justify the recognition of a ‘common-law’ marriage in Panama. Even if such a marriage could be recognized, there is nothing in the record which shows that the parties regarded themselves as husband and wife. On the contrary, the deceased procured a license to marry the woman, indicating that at that time he did not regard the woman as his lawful wife, and, as the license was never utilized, he could not have so regarded her at the time of his death; and the woman herself describes herself as an illegitimate wife. Neither is there any evidence to sustain the relations of the man and woman as a putative marriage. Their relations must, therefore, be regarded as illegitimate, and being such, their posthumous child, should there be one, must also be regarded as illegitimate, for the Code provides that legitimate children are those conceived during the real or putative marriage of their parents (article 6 of Law 57 of 1887), that the subsequent marriage of the parents legitimates *ipso jure* the children conceived before and born after marriage, except if the subsequent marriage is presumed or putative (article 52 of Law 153 of 1887).

I refer to the law in regard to legitimate children for the reason that although the child is not yet born, the Code provides (article 93) that—

‘The rights which would be deferred to a child in the

maternal womb, if it should be born and live, shall be suspended until the birth has taken place. And if the birth constitutes a beginning of existence, the new born shall enter upon the enjoyment of said rights, as if he had existed at the time they were deferred.'

I am of opinion, therefore, that Irene McKenzie is not the 'widow' of the deceased (see *Bolton v. Bolton*, 73 Me., 299); that her claim can not be allowed; and that the claim filed by Edward Davis Howell is the only one properly before the Department.

In reference to this latter claim, attention is called to the meagerness of the information on which to base a judgment as to the dependence of the claimant. It is stated that he customarily received \$5 per month from the deceased. The amount customarily received is only one of the factors from which to judge of dependence. The Department should be advised as to the financial condition of the parent, his earning capacity, etc.

It is recommended, therefore, that the Isthmian Canal Commission be requested to furnish additional information along the line indicated."

In re claim of Fitz Agard, Mar. 9, 1910; No. 2957; Op. Sol. (1915) 550, it was held that the act does not operate to grant compensation to a woman who for several years lived in Barbados and as the "reputed wife" of an employee who was killed in the Canal Zone, and to whom she had borne three illegitimate children.

In re claim of Edward Niemeier (alias W. J. Niemeier). Oct. 3, 1911; No. 7207; Op. Sol. (1915) 551, it was held that a woman who has been divorced from an employee and who has been given the custody of his children is not entitled to compensation on account of his death, though the compensation may be paid to her as guardian for the children. The solicitor said:

"This claim is submitted with special reference to the following question: Is claimant (a 'divorced widow') a

widow within the meaning of the act? (Attention is invited to question 13 and reply, on page 1 of claim.)

It is observed from the affidavit that claim is made by the 'divorced widow' in her own behalf as well as in behalf of two children of the marriage under 16 years of age. It is noted from the record that in granting the divorce the court awarded the custody of the two children to the mother. A woman who has been divorced from her husband is not the 'widow' of the latter after his death' (11 Op. At. Gen.; 30 Am. & E. Ency. Law, 521.) The divorcee in the present case therefore would not be entitled to the payment of any part of the compensation; and as there are no dependent parents whose interests should be considered, the entire amount of compensation should be awarded to the two children and should be paid to the mother as their guardian for their use and benefit."

§ 283. "Child or Children" Includes "Illegitimate Children."

In a very well considered opinion in re claim of J. Harding, Jan. 17, 1910; No. 2059; Op. Sol. (1915) 562, after discussing the cases on the subject, the Solicitor said:

"Notwithstanding, then, the generally accepted view, and the numerous decisions in support of it, referred to at the outset, it is believed that the Secretary would be amply justified in holding that the children of a deceased employee, whether legitimate or illegitimate, at least if there is no reason to question the relationship, are entitled to the benefits of the compensation act. This would be no more than giving to the word 'child' its natural import. It would likewise give effect to the tendency noticeable in modern legislation, toward recognizing in illegitimates the same claims to parental care and support that belong, by natural right, to the young of any species. It would be sustained, moreover, by those authorities above cited, few in number but none the less persuasive, which announce what seems to be the more rational doctrine; and it would follow a principle of public policy which does not depend for its sanction upon the infliction of vicarious

punishment on the innocent and the helpless. On the other hand, to hold, as many courts have done, that the use of the word 'child' in a statute, without any qualification indicating a restricted sense, always implies the issue of lawful wedlock, because in generations past the law regarded a bastard as *nullius filius* and heir to no one, is to adhere to a rule long after the reason, for it has ceased to have point. Such an adherence to mere technicality, based on a legal fiction no longer operative, would be still less reasonable when dealing with a statute which, like the compensation act, is intended for a beneficial purpose and is expressly designed to relieve ordinary laborers and those dependent on them of the necessity of bearing the whole burden resulting from the inevitable accidents incident to the industry in which they are employed. Without saying of Congress what the court in Connecticut said of the legislature of that State, that it is 'a body made up generally of plain men,' it can be said that, in passing the compensation act, 'they made laws for plain men;' and it is at least fair to presume that they used the terms 'child' and 'children' in the statute in question 'in their common, popular signification, rather than with reference to any legal or technical sense,' and that they 'had as little reference to the technical meaning of words in the English common law as they had to the English law of inheritance.' The compensation act does not in any way touch the matter of inheritance.

In my opinion, therefore, for the reasons given, and on the strength of some of the authorities cited, the word 'child' or 'children,' within the meaning of the compensation act, is not restricted to child or children born in wedlock, but includes illegitimate offspring as well. It is accordingly recommended that the claim of Edgar McDonald Harding, the illegitimate child of James F. Harding, deceased, be allowed."

§ 284. Adopted Child.

In re claim of Asencion Estorga, Apr. 3, 1915; Op. Sol. (1915) 566, it was said:

"The claim is submitted with the inquiry whether an adopted child of decedent is entitled to the benefits of the act of May 30, 1908.

The record discloses the fact that decedent left a widow and a child under 16 years of age which, it is stated, was adopted five years ago, and a claim is filed by the widow on behalf of herself and the child. There is nothing further in the record to show whether the child was legally adopted according to the laws of the domicile, and, on the other hand, nothing appears to dispute this fact. It may therefore be assumed that the child was legally adopted.

In the case of Juan Rodriguez (Bu. No. 9441) the question arose whether the father of an adopted son was a dependent parent within the meaning of the act, and it was held in an opinion by the Solicitor, under date of October 12, 1912 (p. 551), that as it was shown that the child was legally adopted in accordance with the practice and custom of the country of domicile, the claimant, the adopting father, stood in the relationship of a natural parent and was therefore entitled to the compensation as a dependent parent.

That being true, it would seem that a child should stand in the same position after being legally adopted as it would generally under the laws of most jurisdictions become an heir at law of the adopting parent or parents.

I therefore conclude, considering that the child was lawfully adopted and stands in the relation of a natural-born child of the decedent, that as such it is entitled to a portion of the compensation payments."

§ 285. To Whom Compensation of Children With Surviving Parent Is Paid.

Where an employee dies, leaving no parent or widow but leaving a child entitled to the benefits of the act, and the acting Spanish consul files an affidavit of claim on behalf of such child, such acting consul may be regarded as acting in loco parentis and his affidavit as the affidavit of the

child. In re claim of J. G. Redondo, May 2, 1910; No. 3218; Op. Sol. (1915) 563.

Where on account of the death of an employee compensation has been allowed to the widow and child and the widow dies within the compensation period, and the care of the child devolves upon the child's maternal grandmother, the remainder of the year's compensation may be paid to such maternal grandmother for the use and benefit of the child. In re claim of J. E. Jefferson, Oct. 1, 1910; No. 2995; Op. Sol. (1915) 564.

§ 286. A Foster Parent By Legal Adoption May Be a Dependent Parent.

In re claim of F. J. Huff, Nov. 24, 1908; No. 160; Op. Sol. (1915) 567, it was said:

"Adoption, like marriage, is a civil contract, and, as a general rule, following the opinion in the William A. Brinkley case under this act, where there are no circumstances which may raise a doubt of the relationship, where it appears that the deceased has lived with and supported a woman who claims to be and was claimed by the deceased to have been the mother by adoption of such deceased, and where the reporting officer, as in this case, states that such relationship existed, it may safely be assumed that the relationship is established.

Upon the question of proving dependence of the parent upon the deceased the opinion in the Brinkley case may again safely be followed, to the effect that a statement by the claimant is sufficient to establish such dependency. In this case claimant states that she necessarily depended upon the deceased, customarily receiving \$6 weekly out of his salary of \$1.75 a day."

In re claim of Charles Perkins, March 24, 1912; No. 8189; Op. Sol. (1915) 579, it was said:

"This case is submitted with the following inquiry: Whether the 'foster father' of the decedent, in the event that he can establish a condition of dependency, would be

entitled to compensation as a 'dependent parent' under the act of May 30, 1908.

This question is raised because of an inquiry submitted to the yard officials, asking whether a foster father, who raised the decedent from his eighth year, but did not adopt him legally, was entitled to compensation under the act of May 30, 1908.

Thus it will be seen that while the foster father raised the decedent, still he never went through the formality of adopting him under the laws of his domicile, consequently, the relationship of parent and child by adoption was never consummated, and in the eyes of the law no inheritable relationship existed. Under the provisions of the above-mentioned act a beneficiary must be either a widow, a child or children under 16 years of age, or a dependent parent."

§ 287. Dependency a Question of Fact—Parents.

In re claim of Theodore Rock, Mar. 24, 1909; No. 516; Op. Sol. (1915) 573, it was said:

"A person is dependent, according to the Standard Dictionary, when 'needing support or aid from outside sources; poor; weak; as, children and invalids are dependent;' and a dependent is defined as 'one who looks to another for support, help, or favor.' Speaking of the British workmen's compensation act, it has been said:

'It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost any other. Dependent probably means dependent for the ordinary necessities of life for a person of that class or position in life. Thus the financial or social position of the recipient for compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause one to receive benefit from the other. Each case must stand on its own merits and be decided as a question of fact.' (Minton-Senhouse

Accidents to Workmen, 197; *Simmons v. White*, 1 Q. B. 1899, 1907.)

Referring to a statute providing for the creation of beneficial assistance, which contemplated the payment of benefits to 'persons dependent upon' a deceased member, it has been held:

'Trivial or casual, or perhaps wholly charitable assistance, would not create a relation of dependency within the meaning of the statute or by-laws. Something more is undoubtedly required. The beneficiaries must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable ground, and not upon the purely voluntary or charitable impulses or disposition of the member.' (*McCarthy v. Order of Protection*, 153 Mass. 318.)

The question of dependence is one of fact and not of law (*Daly v. Steel & Iron Co.*, 155 Mass., 5); and the fact of dependence is sufficiently established for the purposes of an employer's liability law if a condition of only partial dependence for the necessities of life is shown (*Mulhall v. Fallon*, 176 Mass., 267). *Cunningham v. McGreggor* (38 S. L. R., 574) involved the case of a widow who had lived with her children separate from her husband for three years preceding his death. His contributions to the support of the family did not exceed £5 a year. The widow obtained occasional employment and her relatives assisted her. One of her children earned a small wage. It was held that she was wholly dependent upon her husband (see also *Atlanta Railroad, etc. v. Gravitt*, 26 L. R. A. 553).

The amount contributed by the deceased to the support of his parents is therefore by no means the only criterion for determining whether such parents are dependent; although the fact that the deceased had contributed would obviously tend to establish the condition of dependence. The fact that the parents have a natural and equitable, if

not a legal, claim upon their children for care and maintenance makes it proper to consider the actual needs of the parents in any given case in this respect, regardless of how far a deceased child may have been able to supply those needs. And in ascertaining what such needs are it is plainly necessary to look to the age, the circumstances, the position in life, and the earning capacity of such parents. Thus, under section 4707 of the Revised Statutes of the United States, which provides in effect that if a soldier has died, entitled to a pension, and leaves neither widow nor minor children, his mother, father, or orphan sisters or brothers, 'if dependent on him at the time of his death,' shall be entitled to the pension, it was held that a mother is dependent upon her son when she requires for her support the use of a farm in which he has an interest as an heir; that the mother would be entitled to support according to the style in which she had been accustomed to live; and that though the mother, a widow, had some money of her own invested, she was not bound to use the capital for her support, but could be dependent upon the son, within the meaning of the statute, and still keep her money at interest, using the income for her support as far as it would go.

'If that use of the farm was necessary to her support, then she would be, at least in part, dependent upon that, and that dependence would be recognized by permitting her to occupy the farm, as I have stated. . . . She had the right, so far as the construction of this statute is concerned, to keep that money at interest, depend upon the income from it, and treat herself as dependent upon her sons for whatever might be necessary for her support over and above that income. . . . There is a statement here that if the income of the relative claiming to be dependent is less than \$500 per year, that is to be regarded as making him or her dependent. . . . In the opinion of the court, it depends upon the circumstances of each case. The mother is entitled to support according to the style in which she

has been living. If that has been humble and inexpensive, the amount necessary to provide for her would necessarily be less than if she had been living in a more expensive style. The policy of the Government is not to reduce the surviving relatives of the soldier who has lost his life in the service down to the lowest standard of life, but it is to construe the dependent clause, so far as the obligation of the statute is concerned, according to the mode in which the widow had been living. . . . It is for you to determine according to the testimony whether she was adequately provided for, and in determining that you will look to what is necessary for her support.' (U. S. v. Purdy, 38 Fed. Rep. 902.)"

In re claim G. W. Branch, Mar. 18, 1910; No. 2091; Op. Sol. (1915) 576, the Rock case (*supra*) was quoted in part and the Solicitor said further:

"But notwithstanding these considerations, before it can be held that a given claimant is a 'dependent parent' within the meaning of the act, it will not suffice to know merely 'the age, the circumstance, the position in life, and the earning capacity' of the parent; it must further appear that the parent did in fact *depend* upon the deceased, in whole or in part, for a means of living, in so far at least that by reason of the death of the deceased the parent was deprived of a means of support on which he relied and which he would otherwise receive. If it is shown that the parent is in actual need of assistance, the fact of dependence would sufficiently appear, doubtless, if it further appeared that the deceased had attempted to supply that need, even to a slight extent, or that, but for the death of the deceased, the parent was reasonably assured that such need would be supplied in some substantial measure."

Dependency of parents was held established in the following cases: Of both where the employee contributed \$100 in two years and five months prior to death; In re claim Levi Belgrave, Nov. 20, 1909; No. 2061; Op. Sol. (1915) 580; of the mother where the employee contributed \$125

to his mother during the year before his death although the father owned real estate and had an income of \$1,200. In re Leon Esselman, Mar. 25, 1910; No. 2508; Op. Sol. (1915) 581.

A son was in the habit of sending his mother in Ireland small sums of money about May and Christmas of each year. The mother was a pensioner of the British Government and had three other sons. The deceased son left a widow. Upon this state of facts it was concluded that the mother was not a dependent parent. In re claim of Frank Duffy, Sept. 5, 1913; Op. Sol. (1915) 594.

Where decedent contributed large sums to his parents, he being single and the parents having five younger children to raise, these facts, considering the financial condition of the parents, were held to constitute a dependency. In re claim of Jack Scott, Oct. 28, 1913; Op. Sol. (1915) 595.

Decedent left a widow and widowed mother. The widow filed claim, but died before it was approved. The mother joined in the widow's claim, stating that she was not dependent on her son. Subsequently to widow's death the mother filed a claim setting forth her financial condition, that she was 61 years of age, and depended upon her efforts for support. Held that although the son had not contributed, yet her financial and physical condition rendered her a dependent parent. In re claim of William F. Munn, Nov. 25, 1913; Op. Sol. (1915) 597.

Decedent was 20 years of age, and until a few days previous to his death in the Government employ he had worked on the farm of his parents. He had promised to contribute from his Government wages, but met his death before receiving any. Held that parents were dependent, considering all the facts presented. In re claim of Robert Harris, Dec. 16, 1913; Op. Sol. (1915) 598.

Decedent was 21 years of age. The parents claimed that the son had contributed a certain amount during a certain period, which amount was in excess of his earnings.

Considering all the circumstances of the case, including age and financial condition of the parents, it was held that they were not dependent to any extent upon the son, the mere fact of contribution not being sufficient of itself to establish that condition. In re claim of William Rees, Aug. 4, 1914; Op. Sol. (1915) 599.

The deceased employee had, previous to going to work for the Reclamation Service, assisted his parents in the operation of a small farm. On the day he began work he was killed. Considering the age, circumstances, and condition of the parents, they were held entitled as dependent parents. In re claim of Juan Encinas, Nov. 16, 1914; Op. Sol. (1915) 601.

Claim was filed by the mother on account of death of 18-year-old son. As she was unable to establish the fact of contribution by the son, who did not live with her, it was held that dependency was not shown. In re claim of Charles Jones, Dec. 8, 1914; Op. Sol. (1915) 602.

See further Chapter VI, § 166.

SECTION 11.

Burial Expenses.

§ 11. That if death results from the injury within six years the United States shall pay to the personal representative of the deceased employee burial expenses not to exceed \$100, in the discretion of the commission. In the case of an employee whose home is within the United States, if his death occurs away from his home office or outside of the United States, and if so desired by his relatives, the body shall, in the discretion of the commission, be embalmed and transported in a hermetically sealed casket to the home of the employee. Such burial expenses shall not be paid and such transportation shall not be furnished where the death takes place more than one year after the cessation of disability resulting from such injury, or, if there has been no disability preceding death, more than one year after the injury.

See Chapter X, § 249.

SECTION 12.

How Monthly Pay Is Computed.

§ 12. That in computing the monthly pay the usual practice of the service in which the employee was employed shall be followed. Subsistence and the value of quarters furnished an employee shall be included as part of the pay, but overtime pay shall not be taken into account.

SECTION 13.

How Monthly Wage Earning Capacity Is Computed.

§ 13. That in the determination of the employee's monthly wage-earning capacity after the beginning of partial disability, the value of housing, board, lodging, and other advantages which are received from his employer as a part of his remuneration and which can be estimated in money shall be taken into account.

SECTION 14.

Lump Sum Settlements.

§ 14. That in cases of death or of permanent total or permanent partial disability, if the monthly payment to the beneficiary is less than \$5 a month, or if the beneficiary is or is about to become a non-resident of the United States, or if the commission determines that it is for the best interests of the beneficiary, the liability of the United States for compensation to such beneficiary may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at four per centum true discount compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality; but in case of compensation to the widow or widower of the deceased employee, such lump sum shall not exceed

sixty months' compensation. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

See Chapter X, § 239.

SECTIONS 15-16-17.

Written Notices of Injury—When and How to be Given.

§ 15. That every employee injured in the performance of his duty, or some one on his behalf, shall, within forty-eight hours after the injury, give written notice thereof to the immediate superior of the employee. Such notice shall be given by delivering it personally or by depositing it properly stamped and addressed in the mail.

§ 16. That the notice shall state the name and address of the employee, the year, month, day, and hour when and the particular locality where the injury occurred, and the cause and nature of the injury, and shall be signed by and contain the address of the person giving the notice.

§ 17. That unless notice is given within the time specified or unless the immediate superior has actual knowledge of the injury, no compensation shall be allowed, but for any reasonable cause shown, the commission may allow compensation if the notice is filed within one year after the injury.

See Chapter VIII for discussion of notices under the acts generally.

SECTIONS 18-19-20.

Claims for Compensation, When and How Made.

§ 18. That no compensation under this Act shall be allowed to any person, except as provided in § 38, unless he or some one on his behalf shall, within the time specified in § 20, make a written claim therefor. Such claim shall be made by delivering it at the office of the commission or to any commissioner or to any person whom the commission may by regulation designate, or by depositing it in the mail properly stamped and ad-

dressed to the commission or to any person whom the commission may by regulation designate.

§ 19. That every claim shall be made on forms to be furnished by the commission and shall contain all the information required by the commission. Each claim shall be sworn to by the person entitled to compensation or by the person acting on his behalf, and, except in case of death, shall be accompanied by a certificate of the employee's physician stating the nature of the injury and the nature and probable extent of the disability. For any reasonable cause shown the commission may waive the provisions of this section.

§ 20. That all original claims for compensation for disability shall be made within sixty days after the injury. All original claims for compensation for death shall be made within one year after the death. For any reasonable cause shown the commission may allow original claims for compensation for disability to be made at any time within one year.

See Chapter VIII for treatment of claims for compensation in general.

SECTIONS 21-22-23.

Medical Examinations and Fees.

§ 21. That after the injury the employee shall, as frequently and as such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the commission. The employee may have a duly qualified physician designated and paid by him present to participate in such examination. For all examinations after the first the employee shall, in the discretion of the commission, be paid his reasonable traveling and other expenses and loss of wages incurred in order to submit to such examination. If the employee refuses to submit himself for or in any way obstructs any examination, his right to claim compensation under this Act shall be suspended until

such refusal or obstruction ceases. No compensation shall be payable while such refusal or obstruction continues, and the period of such refusal or obstruction shall be deducted from the period for which compensation is payable to him.

§ 22. That in case of any disagreement between the physician making an examination on the part of the United States and the employee's physician the commission shall appoint a third physician, duly qualified, who shall make an examination.

§ 23. That fees for examinations made on the part of the United States under §§ 21 and 22 by physicians who are not already in the service of the United States shall be fixed by the commission. Such fees, and any sum payable to the employee under § 21, shall be paid out of the appropriation for the work of the commission.

See Chapter VII §§ 192-196.

SECTION 24.

Immediate Superior to Report Injuries.

§ 24. That immediately after an injury to an employee resulting in his death or in his probable disability, his immediate superior shall make a report to the commission containing such information as the commission may require, and shall thereafter make such supplementary reports as the commission may require.

SECTION 25.

Assignments Void. Compensation Exempt.

§ 25. That any assignment of a claim for compensation under this Act shall be void and all compensation and claims therefor shall be exempt from all claims of creditors.

See Chapter X, §§ 253, 254.

SECTIONS 26-27.

Injuries Caused by Third Persons. Procedure.

§ 26. If an injury or death for which compen-

sation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the commission may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the commission may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the commission, he shall not be entitled to any compensation under this Act.

The cause of action when assigned to the United States may be prosecuted or compromised by the commission, and if the commission realizes upon such cause of action, it shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expenses of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

§ 27. That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole

or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States on account of the same injury.

See Chapter X, §§ 245-248.

SECTIONS 28-33.

United States Employee's Compensation Commission Organization, Powers.

§ 28. That a commission is hereby created, to be known as the United States Employees' Compensation Commission, and to be composed of three commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman. No commissioner shall hold any other office or position under the United States. No more than two of said commissioners shall be members of the same political party. One of said commissioners shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, and at the expiration of each of said terms, the commissioner then appointed shall be appointed for a period of six years. Each commissioner shall receive a salary of \$4,000 a year. The principal office of said commission shall be in Washington, District of Columbia, but the said commission is authorized to perform its work at any place deemed necessary by said commission, subject to the restrictions and limitations of this Act.

§ 28a. Upon the organization of said commission and notification to the heads of all executive departments that the commission is ready to take

up the work devolved upon it by this Act, all commissions and independent bureaus, by or in which payments for compensation are now provided, together with the adjustment and settlement of such claims, shall cease and determine, and such executive departments, commissions, and independent bureaus shall transfer all pending claims to said commission to be administered by it. The said commission may obtain, in all cases, in addition to the reports provided in section twenty-four, such information and such reports from employees of the departments as may be agreed upon by the commission and the heads of the respective departments. All clerks and employees now exclusively engaged in carrying on said work in the various executive departments, commissions, and independent bureaus, shall be transferred to, and become employees of, the commission at their present grades and salaries.

§ 29. That the commission, or any commissioner by authority of the commission, shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths, and to examine witnesses, upon any matter within the jurisdiction of the commission.

§ 30. That the commission shall have such assistants, clerks, and other employees as may be from time to time provided by Congress. They shall be appointed from lists of eligibles to be supplied by the Civil Service Commission, and in accordance with the civil-service law.

§ 31. That the commission shall submit annually to the Secretary of the Treasury estimates of the appropriations necessary for the work of the commission.

§ 32. That the commission is authorized to make necessary rules and regulations for the enforcement of this Act, and shall decide all questions arising under this Act.

§ 33. That the commission shall make to Congress at the beginning of each regular session a report of its work for the preceding fiscal year, in-

cluding a detailed statement of appropriations and expenditures, a detailed statement showing receipts of and expenditures from the employees' compensation fund, and its recommendations for legislation.

SECTION 34.

Appropriation.

§ 34. That for the fiscal year ending June thirtieth, nineteen hundred and seventeen, there is hereby authorized to be appropriated, from any money in the Treasury not otherwise appropriated, the sum of \$50,000 for the work of the commission, including salaries of the commissioners and of such assistants, clerks, and other employees as the commission may deem necessary, and for traveling expenses, expenses of medical examinations under sections twenty-one and twenty-two, reasonable traveling and other expenses and loss of wages payable to employees under section twenty-one, rent and equipment of offices, purchase of books, stationery, and other supplies, printing and binding to be done at the Government Printing Office, and other necessary expenses.

SECTION 35.

Employees' Compensation Fund.

§ 35. That there is hereby authorized to be appropriated, from any money in the Treasury not otherwise appropriated, the sum of \$500,000, to be set aside as a separate fund in the Treasury, to be known as the employees' compensation fund. To this fund there shall be added such sums as Congress may from time to time appropriate for the purpose. Such fund, including all additions that may be made to it, is hereby authorized to be permanently appropriated for the payment of the compensation provided by this Act, including the medical, surgical, and hospital services and supplies provided by section nine, and the transportation and burial expenses provided by sections nine and eleven. The commission shall submit annually to the Secretary of the Treasury estimates of the

appropriations necessary for the maintenance of the fund.

SECTION 36.

Commission to Award or Refuse Compensation.

§ 36. The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded shall be paid from the employees' compensation fund.

See chapter X, §§ 226-234.

SECTION 37.

Commission May Review Previous Orders or Awards.

§ 37. That if the original claim for compensation has been made within the time specified in section twenty, the commission may, at any time, on its own motion or on application, review the award, and, in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, award compensation.

SECTION 38.

Payments Under Mistake of Law or Fact May Be Recovered.

§ 38. That if any compensation is paid under a mistake of law or of fact, the commission shall immediately cancel any award under which such compensation has been paid and shall recover, as far as practicable, any amount which has been so paid. Any amount so recovered shall be placed to the credit of the employees' compensation fund.

SECTION 39.

Penalty for False Affidavit or Claim.

§ 39. That whoever makes, in any affidavit required under section four or in any claim for compensation, any statement, knowing it to be

false, shall be guilty of perjury and shall be punished by a fine of not more than \$2,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

SECTION 40.

Definitions.

§ 40. That wherever used in this Act—

The singular includes the plural and the masculine includes the feminine.

The term "employee" includes all civil employees of the United States and of the Panama Railroad Company.

The term "commission" shall be taken to refer to the United States Employees' Compensation Commission provided for in section twenty-eight.

The term "physician" includes surgeons.

The term "monthly pay" shall be taken to refer to the monthly pay at the time of the injury.

SECTION 41.

Repealing Clause—Provisos—Panama Railroad—Releases.

§ 41. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided, however,* That for injuries occurring prior to the passage of this Act compensation shall be paid under the law in force at the time of the passage of this Act: *And provided further,* That if an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability in the Panama Railroad Company to pay damages therefor under the laws of any State, Territory, or possession of the United States or of the District of Columbia or of any foreign country, no compensation shall be payable until the person entitled to compensation releases to the Panama Railroad Company any right of action which he may have to enforce such liability of the Panama Railroad Company, or until he assigns to the United States any right which he may have to share in any money or other property re-

ceived in satisfaction of such liability of the Panama Railroad Company.

SECTION 42.

Employees of Panama Canal and Panama Railroad Co.

§ 42. That the President may, from time to time, transfer the administration of this Act so far as employees of the Panama Canal and of the Panama Railroad Company are concerned to the governor of the Panama Canal, and so far as employees of the Alaskan Engineering Commission are concerned to the chairman of that commission, in which cases the words "commission" and "its" wherever they appear in this Act shall, so far as necessary to give effect to such transfer, be read "governor of the Panama Canal" or "chairman of the Alaskan Engineering Commission," as the case may be, and "his"; and the expenses of medical examinations under sections twenty-one and twenty-two, and the reasonable traveling and other expenses and loss of wages payable to employees under section twenty-one, shall be paid out of appropriations for the Panama Canal or for the Alaskan Engineering Commission or out of funds of the Panama Railroad, as the case may be, instead of out of the appropriation for the work of the commission.

In the case of compensation to employees of the Panama Canal or of the Panama Railroad Company for temporary disability, either total or partial, the President may authorize the governor of the Panama Canal to waive, at his discretion, the making of the claim required by section eighteen. In the case of alien employees of the Panama Canal or of the Panama Railroad Company, or of any class or classes of them, the President may remove or modify the minimum limit established by section six on the monthly compensation for disability and the minimum limit established by clause (K) of section ten on the monthly pay on which death compensation is to be computed. The President may authorize the governor of the Panama

Canal and the chairman of the Alaskan Engineering Commission to pay the compensation provided by this Act, including the medical, surgical, and hospital services and supplies provided by section nine and the transportation and burial expenses provided by sections nine and eleven, out of the appropriations for the Panama Canal and for the Alaskan Engineering Commission, such appropriations to be reimbursed for such payments by the transfer of funds from the employees' compensation fund.

Approved, September 7, 1916.

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